Nos. 86-939 and 86-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETSI PIPELINE PROJECT,
Petitioner,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENTS THE KANSAS CITY SOUTHERN RAILWAY COMPANY THE SIERRA CLUB AND THE IOWA AND NEBRASKA CHAPTERS OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA

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QUESTION PRESENTED

Whether the Flood Control Act of 1944, which explicitly authorizes only the Secretary of the Army to execute contracts for the industrial use of water from main stem Missouri River reservoirs, implicitly authorizes the Secretary of the Interior to enter into such contracts for the same use of the same water.

PARTIES TO THE PROCEEDINGS

A complete list of the parties to this proceeding is set out in the petitions for writs of certiorari.

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BRIEF FOR RESPONDENTS THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB AND THE IOWA AND NEBRASKA CHAPTERS OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Pet. App. 1a-44a)[1] affirming the District Court is reported at 787 F.2d 270. The district court opinion (Pet. App. 45a-72a) is reported at 586 F.Supp. 1268.

STATUTES INVOLVED

Sections 5, 6, 7, 8 and 9 of the Flood Control Act of 1944, 58 Stat. 890-891, are set out in the Appendix to this Brief, as are the following additional statutes: Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c); the Act of February 25, 1920, 43 U.S.C. § 521; and Section 212 of the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll*.

STATEMENT OF THE CASE

In the Flood Control Act of 1944, Congress divided federal authority for the management of the waters in the Missouri River Basin between the Department of the Army ("Army") and the Department of the Interior ("Interior"). This division of authority was a purposeful effort by the Congress to protect existing users of water in the Basin and to achieve flood control and allow navigation along the main stem, while also allowing for irrigation. This case arises from the execution in 1982 of a water service contract by Interior that approved the withdrawal of water for industrial use from Oahe Reservoir, a main stem project located on the Missouri River.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in this case by ETSI Pipeline Project (No. 86-939). Hereafter, "J.A." refers to the Joint Appendix, and "App." refers to the Appendix to this brief.

The Interior contract avoided the congressional division of authority under the 1944 Act, and ignored the protections built into the 1944 Act for those who use the waters of the Missouri.

A. The Congressional Decisions In The Flood Control Act Of 1944 That Divided Federal Authority Over The Water Resources Of The Missouri River Basin Between The Army And Interior Departments

During the hearings and debates on the Flood Control Act,[2] Congress endeavored to reconcile several Basin interests. Flood control, navigation and irrigation were the major interests to be accommodated. Intertwined in these concerns were the competing interests of Army's Corps of Engineers ("Corps") and Interior's Bureau of Reclamation ("Bureau") over the question of which agency would control development of the Basin's water resources. These interests in turn were reflected in the Army's Pick Plan (which suggested that Army construct a number of reservoirs in the Basin for flood control and other purposes) and Interior's Sloan Plan (which suggested that Interior construct numerous Basin reservoirs for irrigation and other purposes).[3] (Pet. App. 46a-47a.)

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[2] The legislative vehicle for the decisions by the 1944 Congress concerning the Missouri River Basin was H.R. 4485, an Omnibus Flood Control Bill that was introduced on March 27, 1944 by House Flood Control Committee Chairman Will M. Whittington of Mississippi following detailed hearings that had commenced in June 1943. That bill, as amended later by the Senate, became the Flood Control Act of 1944. The key congressional debates attending consideration of the Act occurred in May and December 1944 in the House, and in November and December 1944 in the Senate. *See* 90 Cong. Rec. 4119-4232, 8231-8431, 8485-8501, 8540-8668, 9259-9269, 9277-9287 (1944). For an overview of the legislative developments leading to enactment of the Act, see *The Missouri Basin's Pick-Sloan Plan: A Case Study in Congressional Policy Determination*, 93-102, M. E. Ridgeway, Ph.D. Thesis, University of Illinois (1952). (Hereinafter cited as *"Ridgeway"*).

[3] The Pick Plan, which emphasized construction of reservoirs on the main stem of the Missouri for flood control and navigation, is contained in H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944); the

Thus, a central focus of Congress in formulating the Flood Control Act of 1944—indeed, at the very heart of the Act's purpose—was the careful division of responsibility between Army and Interior in a fashion that protected existing water users and also accommodated flood control, navigation and reclamation development. There was no dispute that existing lawful uses of main stem Missouri River water should be protected.[4] Likewise, there was universal agreement both in Congress and among the two agencies that duplication, or overlapping jurisdiction, was to be avoided.[5]

Sloan Plan, which emphasized the construction of reservoirs on tributaries to the Missouri for irrigation, is contained in S. Doc. No. 191, 78th Cong. 2d Sess. (1944).

[4] In introducing debate on the Act, Representative Whittington emphasized his intent to protect citizens in their "riparian privileges" and in "the enjoyment of their riparian rights." 90 Cong. Rec. 4124 (1944). The floor manager in the Senate, Senator Overton, stated the clear intention to protect existing lawful uses of water in connection with industrial water marketing from Army reservoirs. *Id.* at 8231. The Conference Report underscored that intention. *Id.* at 9279. And the Sloan Plan emphasized that releases from Oahe Reservoir on the main stem of the Missouri would be required to preserve municipal and sanitation uses downstream. S. Doc. 191 at 116.

[5] Congressional intent to avoid duplication was emphasized by the sponsor of H.R. 4485 himself in the hearings on the bill: "[t]here is no occasion for any controversy between agencies of the Government. There should be cooperation to provide for efficiency as well as economy and *prevent duplication.*" *Flood Control Plans and New Projects: Hearings on H.R. 4485 Before the House Committee on Flood Control*, 78th Cong., 1st Sess. (1943 and 1944) 107 (hereinafter "*House Hearings*") (remarks of Representative Whittington) (emphasis added). His colleagues echoed that intent. *See, e.g.*, 90 Cong. Rec. 4142 (remarks of Representative Case). Moreover, both Interior Secretary Harold Ickes and the Corps' Chief of Engineers agreed that duplication and overlap were to be avoided. *Flood Control: Hearings on H.R. 4485 Before a Subcommittee of the Senate Committee on Commerce*, 78th Cong., 2d Sess. (1944) 457 (hereinafter "*Senate Hearings*") (remarks of Secretary Ickes); *Rivers and Harbors Omnibus Bill: Hearings on H.R. 3961 Before a Subcommittee of the Senate Committee on*

The Pick and Sloan Plans were the two agency reports that provided background information on Missouri River Basin development for congressional deliberations. After H.R. 4485 passed the House, but before it was debated in the Senate, the Corps and the Bureau reconciled the differences between the two Plans. The resulting document was presented to Congress in November of 1944.[6]

Agreement between the Corps and the Bureau on the Pick-Sloan plan did not by itself resolve the questions pertinent to this case. The very general nature of the Pick-Sloan agreement was noted by President Roosevelt as well as members of the Congress.[7] Specifically, "[t]he agreement left to the Congress the problem of determining how and by whom the [Missouri] Valley's development should be administered." *Ridgeway* at 129. It was left for Congress to spell out the final details of the division of authority. Accordingly, the sponsors of the Act in the House and in the Senate clearly explained the intention of Congress to divide authority between the two agencies according to the primary purpose each project would serve: Army was to build and control the main stem dams for flood control and navigation, while Interior was to build and control dams on the tributaries for irrigation.[8]

Commerce, 78th Cong., 2d Sess. (1944) 1241-1242 (remarks of General Reybold).

[6] The joint Pick-Sloan agreement is contained in S. Doc. No. 247, 78th Cong., 2d Sess. (1944). Together, the Pick Plan, the Sloan Plan, and S. Doc. 247 constitute the "Pick-Sloan plan."

[7] 90 Cong. Rec. 8479 (1944) (letter from President Roosevelt to the Senate stating that the joint plan was "only a beginning," and urging the creation of a single authority over the entire Basin to provide for development); *id.* at 8250-51 (remarks of Senator Murray characterizing the joint plan as merely an "engineering agreement").

[8] The chief sponsors of the Act, in both chambers, emphasized the division of authority: "Someone must have control of a dam. If it is a flood control or navigation dam, the Secretary of War has charge of it, and if it is an irrigation dam, the Secretary of the

As finally enacted, the Flood Control Act of 1944 protected existing uses of water and settled the question of authority between Army and Interior over the water resources of the Missouri River Basin by spelling out a careful division according to the function which the water was to serve. In Sections 5, 6, 7, 8 and 9 of the 1944 Act, the Congress divided authority between the two agencies on the following bases:

(1) To the Army Secretary, the Congress granted the authority to construct and operate five dams[9] on the main stem of the Missouri River (Section 9), to develop regulations for flood control and navigation purposes at all dams (Section 7), to allow Interior to construct and operate irrigation works adjacent to Army-controlled dams where the Army concluded irrigation was possible (Section 8), and to enter into contracts for the use of surplus water at Army dams for domestic or industrial purposes so long as existing water uses were protected (Section 6).

(2) To the Interior Secretary, the Congress granted the authority to construct and operate under the reclamation laws dams on the tributaries of the Missouri River (Section 9), to market the hydropower generated at any dam constructed by the Army (Section 5), and to construct irrigation works at the dams constructed by the Army following Army approval (Section 8).

This division of authority set out so carefully by the Congress in the 1944 Act vested authority solely in the Army to control industrial water marketing from the main stem dams. During deliberations over the Act, In-

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Interior has charge of it." 90 Cong. Rec. 8315 (1944) (remarks of Senator Overton); *accord id.* at 8245, 8625; "The works that are predominantly flood control shall be constructed by the Chief of Engineers, and the works that are predominantly reclamation shall be constructed by the Bureau of Reclamation." *Id.* at 9282 (remarks of Representative Whittington).

[9] The Army already was vested with authority to operate a sixth dam it had constructed on the main stem (Fort Peck).

terior and its allies in the Congress attempted unsuccessfully on several occasions to obtain authority for industrial water marketing of main stem reservoir water—the same authority asserted as the basis for the ETSI contract almost forty years later.

B. The Temporary Effort By Army And Interior During The 1970's To Engage In Industrial Water Marketing From Main Stem Missouri River Reservoirs

Armed with an internal memorandum of its Solicitor which ignored Sections 6 and 8 of the Act and suggested that it could engage in industrial water marketing unilaterally, (J.A. 120), Interior pressed Army in 1974 to enter into a Memorandum of Understanding ("MOU") as part of a plan to divert main stem Missouri water for energy use. The Army expressed reservations concerning Interior's claim of unilateral authority to engage in such marketing. For example, the Acting General Counsel of the Army disputed the Interior Solicitor's conclusion, advising the Army's Chief of Civil Functions that although there was "arguable authority" for Army and Interior, "acting jointly," to market main stem water for industrial use, "the Secretary of the Interior may not market the water from these reservoirs independently." (J.A. 129, 135 n.*.) (Pet. App. 10a-11a.)

After further negotiations between the two agencies, the MOU was signed in 1975 as a temporary measure to satisfy perceived energy needs. The MOU provided that Interior would act on its own behalf and as agent for the Army and assume authority to market water for energy use from main stem reservoirs so long as each contract had prior Army approval. (J.A. 136.) (¶¶ 1, 2, 3, 3c.) (*see* ETSI Br. App. 113a). Shortly after signing the MOU, the Army Secretary wrote the Interior Secretary urging that they both seek clarification from the Congress concerning the authority question. (J.A. 142.)

The MOU lapsed in 1978, with Army continuing to express reservations about Interior's assertion of authority. (J.A. 143-144.) It has not been renewed. The In-

terior Department executed two water service contracts under the MOU procedures. Signed in 1982, the ETSI contract was the only water service contract that was both negotiated and executed by the Interior without reliance upon the MOU. It was Interior's only independent unilateral effort to contract for main stem Missouri River water for industrial purposes. (Pet. App. 11a.)

C. The Decisions Below That Enjoin The ETSI Contract

Interior invoked Section 9(c) of the 1944 Act to execute a water service contract with ETSI in July 1982 as part of a "program" of furthering Missouri River water withdrawals for energy use. The contract was not approved by Army. (Pet. App. 15a-16a.) It would have allowed the transfer of 20,000 acre feet of water annually from the Oahe Reservoir on the main stem of the Missouri River in North and South Dakota to the Powder River Basin in Wyoming, where it would have been mixed with crushed coal and then used to transport that coal in the form of a slurry out of the Missouri River Basin to unspecified power plants in Oklahoma, Arkansas and Louisiana.[10] There the water would have been discharged; none of it would have been returned to the Basin.

Concerned that the ETSI project was harmful and unnecessary, and that it would set the precedent for additional industrial water withdrawals from the Missouri, the private respondents (the Kansas City Southern Railway Company, the Sierra Club and three chapters of the National Farmers Union) challenged the Interior Secretary's authority to enter into the ETSI contract on sev-

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[10] Twenty-thousand acre feet of water equals approximately 6.5 billion gallons. Based on standard estimates of average daily personal water needs, *see* A. S. Goodman, *Principles of Water Resources Planning* 87 (1984), this would constitute enough water to provide the annual municipal supply of a town of 133,000 inhabitants. ETSI had also agreed to permit certain towns in western South Dakota to use its pipeline to transport water. See ETSI Br. at 4. However, those towns would have executed contracts for that municipal use with Army, not Interior. *See* App. 19a.

eral grounds.[11] On May 3, 1984, the district court concluded that the Interior Secretary was not authorized to execute the ETSI contract, and granted private respondents' motion for summary judgment as to Count III of their complaint, permanently enjoining contract performance.[12]

The district court entered the following findings that were confirmed by the court of appeals and that remain central to this case: (1) Oahe Reservoir was undertaken by the Corps under Section 9(b) of the 1944 Act, and was not undertaken by the Bureau under Section 9(c) (Pet. App. 54a); (2) there is no separate storage space designated for irrigation at Oahe (*id.* at 63a-64a); (3) the dominant purpose of Oahe is flood control, not reclamation (*id.* at 56a); and (4) Interior has never promulgated regulations governing irrigation storage at Oahe, nor has it taken any reclamation actions with respect to Oahe (*id.* at 61a, 64a-65a). The court concluded both

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[11] The States of Missouri, Iowa and Nebraska also challenged the ETSI contract. In addition to asserting that the Interior Secretary had acted in contravention of Section 6 of the Act, respondents challenged execution of the ETSI contract on other grounds, including that the diversion of water proposed by ETSI would constitute an unprecedented interstate transfer of water out of the Missouri River Basin states, that ETSI's use was not an authorized use, and that Interior had not adequately assessed the environmental impacts of the ETSI project. These other challenges presented in the private respondents' complaint, including the other authority issues, remain pending in the district court and are not present here.

[12] After initially dismissing the Kansas City Southern Railway Company along with the Rocky Mountain Chapter of the National Farmers Union for lack of standing to challenge the Interior Secretary's authority, the district court vacated that decision as to the Company upon reviewing additional evidence showing that the Company relied upon specific quantities of Missouri River water at its Kansas City corporate headquarters, reserved a decision on the Company's standing, and allowed it to participate in the appeals. (Filings 294, 366 and 386 at J.A. 68, 75, 77.) The Eighth Circuit did not reach the issue of standing with respect to the private respondents in its opinion below (Pet. App. 7a, 11a-15a), and that issue is not raised in the petitioners' briefs. *Cf.* Fed. Br. at 20.

that Congress granted control over the storage space in flood control projects such as Oahe to the Corps, not to the Bureau (*id.* at 59a-63a), and that Oahe Reservoir is not a reclamation development (*id.* at 64a-65a).

In addition, the district court noted that the congressional debate over the 1944 Act was comprehensive, and concluded that Congress left no issue as to the division of authority between Army and Interior for implication. (*Id.* at 68a.) In that spirit, the court ruled that the express grant of industrial water marketing authority to the Army in Section 6 is exclusive, and that a similar grant of authority to Interior cannot properly be implied from Section 9. (*Id.* at 67a.)

In the wake of the district court decision, ETSI and South Dakota briefly pursued an application to the Army for Oahe water under the Water Supply Act of 1958, 43 U.S.C. 390b. However, in July 1984 ETSI terminated its agreement with the South Dakota Conservancy District for assignment of a water right from Oahe (J.A. 257), and announced that it had also terminated its project. The respondents then suggested that the appeals should be dismissed as moot or unripe. Following remand to the district court for an initial mootness determination, a split panel of the Eighth Circuit ruled that the case was not moot.[13] On the merits, the court of appeals affirmed the district court.

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[13] The district court's determination that this case was not moot erroneously assumed that live issues remained outstanding between the petitioners and the respondents even after ETSI had cancelled its South Dakota water permit and terminated its project. It gave no weight to the critical fact that the water permit was an express precondition to the validity of the contract. (J.A. 227.) It also concluded that Interior's "program" of water withdrawals remained ripe for consideration, even though the ETSI contract constituted the only unilateral effort by Interior to implement that program. In addition, it invoked the wrong legal standard, ignoring *Powell v. McCormack*, 395 U.S. 486, 496 (1969) and *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-396 (1980), which hold that a case is moot where the issues presented are no longer "live" as between the adverse parties, and relying instead on the inap-

The court of appeals concluded as a threshold matter that the plain language of Section 9 "does not attempt to delegate authority on the basis of storage for a particular use within a given development." (Pet. App. 19a.) Instead, said the court, Section 9 "envisions that each department will develop the projects which it undertakes in accordance with the applicable law, and specifically, that the reclamation laws will govern projects undertaken by the Secretary of the Interior." *Id.* Thus, in the court's view, "the inquiry in this case then is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to Section 9(c) of the Act." *Id.* The court of appeals concluded that it was not.[14]

The court of appeals refused to accept the petitioners' argument that the Interior Secretary enjoys industrial water marketing authority so long as there is "irrigation storage" available at Oahe. (*Id.* at 22a-24a and nn. 15 and 16.) The court explained that while the Congress may have granted Interior authority to engage in irrigation at Oahe, that authority did not extend "to use of irrigation *storage* for industrial purposes." (*Id.* at 24a n.16) (emphasis in original). The court also emphasized the

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posite reasoning of *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). (Fed. Pet. Reply at 3a-6a.) After reviewing briefs from all parties (see J.A. at 86), two members of the Eighth Circuit panel concluded that the district court's "factual" findings were not clearly erroneous. (Fed. Pet. Reply at 2a.) Nonetheless, the record developed before the courts below strongly suggests that the issue before the Court is not live as to ETSI, and at best unripe as to Interior. (*See* Filings 442 and 443 at J.A. 41.)

[14] In so doing, the court of appeals expressly adopted the factual findings of the district court (Pet. App. 19a), and affirmed each of the district court's conclusions, agreeing: (1) that the mere existence of irrigation capacity at Oahe is not sufficient to render it a reclamation development undertaken by Interior; (2) that there has been no significant reclamation development at Oahe and there is no separate storage space allocated for irrigation there; and (3) that the Congress had determined each dam would be undertaken and controlled by the agency with the dominant interest in the purpose for which the dam was constructed. (*Id.* at 20a-21a.)

clear grant of authority in Section 6 to the Secretary of the Army to contract for industrial use of water stored at main stem reservoirs, and concluded that it would be incongruous to assume that a Congress intent on demarcating jurisdiction between two agencies would authorize those very agencies to contract for the same use from the same reservoirs. (*Id.* at 31a and n.23.) One member of the panel dissented, and an evenly divided court of appeals denied rehearing. The petitions for writ of certiorari were granted on March 2, 1987.

D. The Practical Implications Of This Case For Existing Users Of Missouri River Water

The private respondents, who represent farm, conservation and commercial interests located in the Missouri River Basin,[15] believe that the rulings below are important because they ensure the maximum flexible multipurpose development of the River's resources in a fashion that recognizes the intention of Congress to protect the interests of existing users of Missouri River water. First, Section 6 of the 1944 Flood Control Act explicitly requires the Army Secretary to take into account the effects of water depletions for industrial use from Army reservoirs upon existing users, thereby ensuring that dependable flows of the Missouri are maintained downstream of the main stem dams. The reclamation laws triggered by Section 9(c) of that Act do not require any such finding by the Interior Secretary. To the contrary, Interior need only satisfy itself that miscellaneous use of water from a

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[15] The Kansas City Southern Railway Company is headquartered in Kansas City, Missouri and relies on the Missouri River for its water supply there. In addition, it hauls coal and agricultural commodities in portions of the Basin. The Sierra Club has members throughout the Missouri Basin whose use and enjoyment of natural resources would be affected by the government program of industrial diversions of water from the River embodied in the ETSI project. Members of the Iowa and Nebraska Farmers Union Chapters reside alongside the Missouri and use its waters for crop and livestock purposes.

dam will not impair the "irrigation efficiency" of the reservoir itself.[16]

At the same time, the rulings below and the interests of the private respondents in protecting adequate Missouri River flows pursuant to Section 6 also further the interests of others in the Basin, and support the national interest, in certain important respects. The Army's existing regulations under Section 6, as well as recently-prepared policy guidance, demonstrate that agency's concern for protecting a broad range of water users.[17] Furthermore, monies collected by the Army under Section 6 from industrial water users are deposited into the general fund of the United States treasury, thereby helping, in some measure, to repay the nation for its significant investment in the main stem dams of the Missouri Basin.

In addition, our reading of the Act, and the rulings of both courts below, comport fully with the national reach of the Corps' jurisdiction (as opposed to the purely western jurisdiction of the Bureau) and with the day-to-

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[16] Events in this case are instructive in this regard. Respondents expressed concern below that the ETSI project and the program of which it was a part would exacerbate water supply problems duing low-flow periods on the Missouri, and would create other significant adverse impacts. (*See* Filing 1 [Complaint] J.A. 42 at ¶¶ 23-33.) But Interior failed to analyze the downstream impacts of the ETSI diversion, wrongly claiming that it had already done so in a generic impact statement prepared in 1977. (*See* Filing 1, J.A. 42 at ¶¶ 39-46.) Similarly, Interior emphasized that it would not engage in any further analysis of downstream impacts occasioned by the additional water withdrawals it contemplated under its "program." On the other hand, one of the Army's first actions when presented with the 1984 application for Oahe water on ETSI's behalf was to give notice that, "[a]s the Federal agency responsible for marketing storage for the industrial water," it intended to prepare a supplemental environmental impact statement that would have assessed "Missouri River depletion impacts." 49 Fed. Reg. 30223-24 (July 27, 1984). Army halted that effort when ETSI cancelled its project.

[17] *See* J.A. 207; *see also* March 13, 1986 Opinion of Army General Counsel (App. 16a); March 24, 1987 Memorandum for the Director of Civil Works (App. 19a).

day operation of the projects along the main stem of the Missouri River—an operation that is controlled by the Army from its Reservoir Control Center in Omaha, Nebraska. The Army publishes and implements both the "Master Manual" and the "Annual Operating Plan" for main stem reservoir operations.[18] *See* Fed. Br. at 41 n. 61. Because the Army, and not Interior, oversees the day-to-day orchestration of the interrelated operations of each of the main stem dams for the benefit of the entire Missouri Basin, Army is uniquely situated to assess the merits of any application for industrial water use from a dam on the main stem such as Oahe.

SUMMARY OF THE ARGUMENT

Congress enacted the Flood Control Act of 1944 in a careful effort to provide for wise conservation and development of the water resources of the Missouri River Basin. In several key provisions, the Act directs protection for existing uses of those resources, and provides for the construction and operation of dam and reservoir projects to ensure that flood control and navigation will be paramount on the main stem of the Missouri, while irrigation will be preeminent on the River's tributaries. In addition, the Act specifically provides that waters deemed surplus to the functions for which the main stem dams are designed can be made available for industrial use by the Secretary of the Army, so long as such water marketing does not adversely affect existing water uses. The question here is whether the Interior Secretary, who is not bound to protect existing water uses other than for irrigation, properly interpreted the Act by asserting author-

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[18] The Corps' *1981-1982 Missouri River Main Stem Reservoirs Annual Operating Plan* ("AOP") is a detailed 85-page document that analyzes prior experience with the operation of the reservoirs and sets out plans for manipulation of those reservoirs in the coming year to satisfy requirements both upstream and downstream. The AOP specifically provides for the maintenance of water supply for upstream irrigation, as well as the release of flows for downstream municipal water supply and water quality control. *Id.* at 4-5, 8-10.

ity to market water for industrial use from Oahe Reservoir, a main stem project constructed and operated by the Army.

The plain language of the Act does not provide Interior the authority it seeks. In Section 6, the Act expressly provides Army the authority to market for industrial use water deemed surplus at Army-controlled dams. In that same section, the Act directs that in marketing that water, Army protect existing users of the Missouri River from excessive depletions.

By contrast to Section 6, the Act is silent on its face as to the existence in Interior of unilateral industrial water marketing authority at Army dams. Indeed, in Section 8, the Act requires Interior to gain prior approval by Army, as well as specific congressional authorization, before constructing irrigation works at Army reservoirs and applying reclamation law to waters used for that irrigation.

Faced with statutory language that does not in plain terms grant authority to Interior, the petitioners abandon the Act and embark upon a lengthy and complicated exegesis that elevates non-statutory agency comments to the level of enacted law, ignores congressional rejections of attempts to secure the authority in question, garbles the common usage and contemporaneous understanding of selected terms found in the Act, and finally produces a result that directly conflicts with the central intentions of Congress. At bottom, petitioners ignore the fact that any authority Interior might enjoy under the reclamation laws at Oahe would derive from construction of approved irrigation works there. No such works have been built.

Petitioners' argument relies heavily upon agency-authored comments from the Pick and Sloan Plans—two Missouri River Basin development documents that were submitted to the Congress and "approved" in Section 9(a) of the 1944 Act. Improperly elevating these agency comments to the level of enacted law, and injecting them with an expansive reading not supported by the actual words used, the petitioners argue that Section 9 author-

ized the Interior Secretary to enter into the industrial water contract in issue here.

The fatal flaw in petitioners' reliance upon these snippets from the Pick and Sloan documents is that the Congress itself unequivocally rejected the concept of Interior control over water stored at Army dams during deliberations over the 1944 Act. Specifically, Congress rejected several amendments to Section 6 proposed by the Interior Secretary and his allies that would have granted him such control. Moreover, elsewhere (in Section 8), Congress significantly altered a suggestion of the Interior Secretary that would have granted him authority over water stored at Army dams, by carefully limiting his authority at such dams to the distribution of water for irrigation following Army approval and specific congressional authorization of irrigation works.

Additionally, in Section 9(c) of the Act, the Congress made clear that the Interior Secretary could exercise his powers under the reclamation laws only in connection with reclamation developments to be undertaken by him. The government contends that the ETSI contract itself can be deemed an Interior "reclamation development," while ETSI contends that water "stored for irrigation at Oahe" is such a development. But these contentions ignore the contemporaneous understanding of the Interior Secretary, his Reclamation Commissioner, and the Congress, as well as a host of other legislative definitions and understandings.

Finally, the interpretation for which the petitioners strive would ignore the plain intention of the Congress in the Flood Control Act of 1944: to divide jurisdiction between Army and Interior over the use of Missouri River water resources in a fashion that avoided duplication of effort and furthered efficient development of those resources while protecting lawful uses of the River. As written, Sections 6, 8 and 9 of the Act fit together neatly, making flood control, navigation, irrigation and industrial uses available, and protecting existing uses, without producing any conflict between Army and Interior. Petitioners' concept would ignore this carefully-

crafted statutory plan. It would not promote wise use and conservation of those resources; instead, it would avoid the protections built into the Act.

This case presents a pure issue of statutory interpretation that is governed by the plain language of the 1944 Act. In developing the Act itself, and in 1982, the Congress rejected the theory under which Interior seeks authority here. Moreover, both Interior and Army have since 1944 taken positions contrary to the one here presented. Thus, deference to the petitioners' construction of the Act is inappropriate. The rulings below carefully follow the language and legislative history of the Flood Control Act of 1944, and they should be affirmed.

ARGUMENT

I. The Plain Language Of The Flood Control Act Of 1944 Exclusively Empowers The Secretary Of The Army To Control The Marketing Of Water From Main Stem Missouri River Reservoirs For Industrial Use

Any endeavor at statutory interpretation naturally begins with the words of the statute. *Park 'N Fly v. Dollar Park and Fly*, 105 S.Ct. 658, 662 (1985). "If the statutory language is clear, it is ordinarily conclusive." *United States v. Clark*, 454 U.S. 555, 560 (1982). In this part of the brief, respondents show that the language of the Flood Control Act of 1944 is clear, and that it denies Interior authority to execute the ETSI contract. Respondents address petitioners' interpretation of the Act in Part II.

A. Section 6 Of The Flood Control Act Authorizes Only The Army To Contract For Industrial Use Of Water At Main Stem Reservoirs

The two lower court decisions properly recognized that the Congress clearly addressed the issue presented in this case. In 1944, Congress expressly considered and decided which agency should market water for industrial purposes from main stem Missouri River dams operated by the Army. And in Section 6 of the Flood Control Act, Congress gave its unambiguous answer:

> Sec. 6. *The Secretary of the Army is authorized to make contracts* with States, municipalities, private concerns, or individuals, *at such prices and on such terms as he may deem reasonable, for* domestic and *industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army. Provided, that no contracts for such water shall adversely affect then existing lawful uses of such water.* All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

33 U.S.C. § 708 (emphasis added). There is no dispute that the Oahe reservoir is "under the control of the Department of the Army." Thus, the courts below concluded (Pet. App. 31a and n. 23), and the government does not dispute, Fed. Br. at 38-39 and n.58, that under this provision the Army is authorized to contract for the same water for the same purpose as that envisioned in the ETSI contract.

Because Congress used such express language, it is inappropriate to fabricate a concurrent authority in a second agency through an extended analysis of legislative materials and other provisions both within and without the Flood Control Act. This is particularly true given the fundamental Congressional intent to delineate clearly the respective powers of Interior and Army in order to avoid overlap and duplication between the two agencies. (See pp. 2-4, *supra.*) In short, having expressly declared one agency's authority in one section of the Act, it is not credible to assert that the Congress would then shroud another agency's identical authority in a maze of statutory subtleties. *See Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

For Army-operated dams, Section 6 expressly grants industrial water contracting authority to the Secretary of the Army alone. Army's control over such activity is in turn reinforced by the language of Section 8 of the Flood Control Act. Section 8 demonstrates that Interior lacks *any* defined authority at dams like Oahe, where it

has never built the additional works necessary for irrigation.

B. Under Section 8 Of The Flood Control Act, The Reclamation Laws Do Not Apply To Army-Controlled Reservoirs Unless And Until Interior Completes Additional Works For Irrigation Purposes After Army Approval

Section 8 of the Flood Control Act precisely defines the limited authority of the Interior Secretary at dams operated by the Army. (App 2a-3a.) (Pet. App. 27a.)

Section 8 defines the relative power of Army and Interior by establishing the procedure Interior must use to acquire reclamation authority at Army-controlled dams. At "any dam and reservoir project operated under the direction of the Secretary of the Army," the Interior Secretary is, under certain conditions, authorized to build and operate "such additional works . . . as he may deem necessary for irrigation purposes." Where additional works are built, Section 8 authorizes the Interior Secretary to proceed "under the provisions of" the Reclamation Act of 1902, and thus incorporates those provisions to govern the "additional works."

Section 8 thus authorizes the Interior Secretary to carry out irrigation through irrigation works at Army-controlled dams if and only if three conditions are met: (1) "the Secretary of the Army determines . . . that [the] dam and reservoir project . . . may be utilized for irrigation purposes," (2) the Interior Secretary makes "a report and findings [on the proposed irrigation works] . . . as provided in said Federal reclamation law," and (3) Congress grants a "subsequent specific authorization . . . by an authorization Act." [19]

Thus, Section 8 establishes a limited sphere of authority for Interior at Army-controlled reservoirs to construct, operate and maintain irrigation works following

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[19] In 1986, the Congress amended Section 8 to authorize Army to allocate for irrigation use water that otherwise would be available for municipal and industrial purposes. Pub. L. No. 99-662, Section 931, 100 Stat. 4196; 43 U.S.C.A. 390 (1987 Supp.).

approval by both Army and the Congress. Where the Interior Secretary builds and operates those works necessary for irrigation, the reclamation laws are incorporated to govern such action. Conversely, where the Interior Secretary has not obtained Army and congressional approval and has not built the necessary works—where the irrigation function remains only a potential, not a reality—Interior simply cannot rely upon reclamation law to support industrial water marketing authority. By designing Section 8 in this fashion, Congress emphasized that Interior's authority at Army dams was limited, and ensured that the protections for existing users contained in Section 6 would not be eroded.

There is no dispute that the Interior Secretary never constructed at Oahe, and does not operate or maintain, "additional works . . . necessary for irrigation purposes." [20] Thus, as Congress confirmed in 1982 (see pp. 41-42, *infra*) absent the construction and operation by Interior of irrigation works at Oahe, the reclamation laws do not apply there. Interior is therefore without authority to market Oahe water under the reclamation laws.

C. Section 9 Of The Flood Control Act Incorporates The Reclamation Laws Only For Reclamation Developments To Be Undertaken By The Secretary Of The Interior

Sections 6 and 8 speak directly to the issue presented in this case, and plainly provide that at Army-operated dams like Oahe, the Army is empowered to control the marketing of water for industrial uses. The two sections fit together to provide for efficient water development

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[20] Congress gave specific authorization for such construction in 1968. Act of August 3, 1968, Pub. L. No. 90-453, 82 Stat. 624, 625. However, the work had "barely started" by mid-1975 (ETSI Br. App. at 123a), and in 1978 the South Dakota legislature enacted a construction moratorium. 1978 S.D. Session Laws Ch. 333, codified at S.D.C.L. § 46A-1-78. In 1982, the Congress enacted legislation authorizing Interior to cancel the master contract for the initial stages of the Oahe irrigation unit. Act of September 30, 1982, Pub. L. No. 97-273, 96 Stat. 1181.

while ensuring that water users of the River are protected by Army. Section 9, the provision of the Flood Control Act that authorized the Missouri River Basin projects, furthers this statutory plan. (App. 3a-4a). Section 9 divides the Missouri River projects into two groups, those "to be undertaken by the War Department [Army]," and those "to be undertaken by the Secretary of the Interior," and applies the reclamation laws *only* to the latter.

Section 9(a) "approves" the Pick-Sloan plan and "authorizes" its initial stages. Sections 9(b) and 9(c) establish what federal law shall govern which projects; they also provide that works to be undertaken by Army shall be prosecuted under its direction. Where Section 9(c) applies the reclamation laws to govern the "reclamation and power developments to be undertaken by the Secretary of the Interior," Section 9(b) places the flood control projects "under the direction of the Secretary of the Army and supervision of the Chief of Engineers."

Thus, Sections 9(b) and 9(c) provide that the law that governs a work or development depends on which agency is to undertake that work or development under the approved plan. The reclamation laws apply only to those developments to be undertaken by Interior. It is abundantly clear, however, that Interior did not "undertake" the Oahe project, either in whole or in part. Nor has Interior "undertaken" any reclamation or power development of Oahe after it was built. Under both the Pick plan and the Sloan plan, Oahe dam and reservoir were to be undertaken by the Corps because its predominant purpose was flood control and navigation. H.R. Doc. No. 475 at 7; S. Doc. No. 191 at 4, 7. In fact, there is no dispute that Oahe was constructed entirely by the Corps and no part of it was undertaken by Interior. ETSI Br. at 5; (Pet. App. 10a). Without question, therefore, Section 9(c) cannot apply the reclamation laws to the Oahe project, but those provisions governing dams "under the control" or "under the direction" of the Army, such as Sections 6 and 8, do control the use of water at Oahe.

II. The Flood Control Act Of 1944 Does Not Authorize The Secretary Of The Interior To Execute The ETSI Industrial Water Service Contract

Part I of this brief explains the relevant sections of the Flood Control Act of 1944 by relying on the plain language in each section. Petitioners' method of interpretation is quite different: they begin with legislative materials and work backwards, seeking to explain away troublesome statutory language with ostensibly helpful legislative history. In making the statutory terms secondary to other sources of interpretation, the government and ETSI distort the meaning of the Act.

Moreover, petitioners' analysis is fundamentally flawed. It rests entirely on the incorrect assumption that in 1944 Congress divided the powers of Army and Interior by assigning to each some quantity of water storage that each agency would regulate and control. But the Flood Control Act divided *authority*, not water. With respect to each dam in the Missouri River Basin, Congress divided the agencies' authority according to purpose and control. The question of which agency is authorized to market water from a Missouri River Basin dam thus depends not on how the agency asserting authority characterizes the block of reservoir water it seeks to manage, but on which agency controls the dam and for what purpose the water is used. Though Congress reserved the function of reclamation and miscellaneous water uses in Interior at dams Interior controls, it also empowered the Army to manage industrial uses of water at dams under Army control.

To justify their view, ETSI and the government seriously misconstrue the three pertinent sections of the Flood Control Act, giving at best selective attention to the actual terms of those provisions. None of their contentions withstands scrutiny.

A. Section 9 Does Not Authorize The Interior Secretary To Market Water For Industrial Use At Oahe Reservoir

A central thesis of petitioners' argument is that by enacting Section 9 Congress allocated to Interior some

quantity of water at Oahe and other Army-controlled projects that would remain subject to the control of Interior regardless of actual use. Only by viewing the Act in this manner could they frame the question presented as whether the Interior Secretary is authorized to supply "unutilized" or "excess" "*irrigation water*" from main stem dams for industrial use. Their argument then focuses on Interior's reclamation authority at projects under its control, and contends that this authority must extend to "irrigation water" at Oahe. But under a correct reading of the Act, at present there is no reserved block of "irrigation water" at Oahe. Under Section 8, Interior may engage in irrigation functions at Oahe, if it first obtains Army and congressional approval. But there is no existing block of "irrigation water" at Oahe, because Interior has not built the additional works necessary for irrigation, and because no water has ever been drafted into those works to serve an irrigation function.

The government attempts to resolve this problem by contending that the ETSI contract itself constitutes an Interior "reclamation development." This contention, too, is plainly wrong.

1. *Section 9(a) Does Not, By Approving The Pick-Sloan Plan, Reserve Any Block of Water For Interior Control*

Congress stated in Section 9(a) that it approved the "general comprehensive plans set forth" in the three Pick-Sloan documents. The government and ETSI suggest that this provision incorporates in full all the language of those documents and then embark on a review of those documents and various references in the legislative record of the Act. Fed. Br. 2, 21, 24-29; ETSI Br. 11-16. From this review they wrongly conclude that Interior is authorized to 'administer the reclamation aspects" of Missouri Basin development. They then seek to defend that conclusion despite the plain language of Sections 6 and 8. This analysis is seriously deficient in two respects.

First, this argument wrongly accords the statements in the Pick-Sloan plan the same dignity as the statutory

language of the Act itself. Congress vigorously debated and amended the bill that became the Flood Control Act of 1944. Congress would not labor over an express statutory provision if it meant for the issue to be controlled merely by reference to legislative documents. (Pet. App. 31a and n.23; 68a.) The proper analysis thus begins with the language of those provisions, and only then considers the Pick-Sloan documents. *See Kosak v. United States*, 465 U.S. 848, 853 (1984); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798 (1984). Indeed, because the Act's language has primacy over referenced material, the proper analysis seeks to reconcile the Pick-Sloan documents with the statutory provisions, not vice versa. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96, *reh'g denied*, 341 U.S. 956 (1951) (Jackson and Minton, JJ., concurring).

The supremacy of statutory language over the language of a referenced legislative "plan" is demonstrated by *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153 (1953). *Chapman* teaches that even where the statute is *silent* as to an issue, the language of an "approved" plan does not control unless it is "clearly an integral part of the plan."[21] *A fortiori*, where the statutory language *does* address an issue, the language of the report cannot rule. Since Sections 6 and 8 plainly provide that the Army is authorized to control the marketing of water for industrial uses from Army dams, any contrary implication from the reports cannot govern. Especially because the division of federal authority for the entire Missouri River Basin is a significant controversy, it cannot be assumed that Congress would decide the issue with vague declarations in a referenced report.

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[21] In *Chapman* this Court emphasized that language in transmittal letters appearing in a Corps report "approved" by the Congress in the 1944 Act was not sufficiently plain, nor sufficiently made "an integral part of the plan," to assist in resolving the issue presented. *Id.* at 160. *Chapman* applies with even greater force here, where the actual language of the reports is silent on industrial use by Interior and in fact states that Army will control the main stem reservoirs.

Indeed, a search for *any* clear and unambiguous statements in the Pick and Sloan plans supporting the petitioners' analysis reveals a second major flaw: the language of the Pick-Sloan plan nowhere expressly grants Interior the authority to market water from main stem dams for industrial purposes. Not only is there no clearly manifested intent to grant Interior such authority, there are no statements that even imply such a conclusion.[22]

ETSI quotes language which states that Interior shall control the irrigation "features" of a project, and apparently reasons that Oahe's irrigation potential is a "feature" of that project subject to Interior control. ETSI Br. at 13. But the very language ETSI quotes belies this interpretation. The Sloan Plan states at page 11 that "[t]he agency with primary interest in the dominant function of any feature proposed in the plan should *construct and operate that feature.*" (emphasis added). Clearly, it was understood that features are particular, concrete works.[23] So when the Sloan Plan states on the same page that "[a]ll irrigation features should be operated by the Bureau of Reclamation," it simply means that the Bureau is responsible for operating irrigation works, even at Army-controlled dams. This language is perfectly consistent with the plain meaning of Section 8.

Similarly, petitioners quote language stating that Interior should regulate "utilization of storage *reserved for irrigation* in all multi-purpose reservoirs." Fed. Br. at 25;

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[22] The congressional debate mirrored this fact. The district court noted that "[a]lthough many people discussed the division of control over the main stem reservoirs, nobody said that the Bureau's level of control over certain water stored for irrigation in Corps-built dams was so complete that the Bureau could furnish that irrigation water for non-irrigation purposes, *i.e.*, industrial or miscellaneous uses." (Pet. App. 58a-59a.)

[23] As Senator Overton emphasized, at Army dams "*the irrigation features of it, that is, all irrigation works* necessary to utilize the surplus water in the dam shall be turned over to and administered by the Interior Department. . . ." *Senate Hearings* at 222 (emphasis added). Similarly, Reclamation Commissioner Bashore testified to the House concerning *construction* of irrigation *features*. *House Hearings* at 912-13.

ETSI Br. at 12 (quoting Pick Plan at 3-4). Petitioners merely assume that water has been "reserved for irrigation" because Congress contemplated that Oahe would serve an irrigation function. But the fact that Congress authorized a dam with irrigation potential, and contemplated that irrigation might eventually occur, does not mean that Congress reserved any block of water as "irrigation water," or granted Interior any control over some portion of Oahe reservoir, even in advance of any reclamation project.

Indeed, Congress specifically established a procedure in Section 8 whereby water could be reserved for irrigation, a procedure never completed at Oahe. Before the necessary irrigation works are constructed, water is drawn into the distribution system, and Interior contracts with an irrigation for water, water is in no sense *reserved* for irrigation.[24] Moreover, Congress' failure to specify any quantity of water "reserved" for irrigation counsels against inferring that it reserved any water for that purpose. As the district court stated: "[O]ne wonders how the Interior Department is to control what cannot be identified." (Pet. App. 64a).[25]

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[24] The legislative history demonstrates that Bureau jurisdiction was limited to control of water in the distribution systems, "after it is released" from the reservoir. *See House Hearings* at 646. Thus the district court observed that "the Bureau's interest in the irrigation aspects of a flood control dam would be accommodated by letting the Bureau control the irrigation distribution system, not the water or storage space in the reservoir." (Pet. App. 58a.)

[25] Before the district court, the federal government and ETSI pointed to "different blocks of water" over which Interior allegedly exercised control. (Pet. App. 64a.) Here, ETSI ignores the issue, while the government attempts to dismiss it as "formalistic." Fed. Br. at 41-42 n.62. Thus, they never expressly state *how much* water is supposedly "irrigation water." Amici admit that "[i]t is *not possible* from reading Section 9(a) or the Pick-Sloan Plan . . . to quantify precisely the volumes of water under the control of each Secretary," but agree with the government that such inquiry is unnecessary. Amici Br. at 17. To the contrary, the inquiry is critical to establishing an outer limit on the amount of water Interior would divert from main stem dams under its industrial

2. *The ETSI Contract Is Not A Reclamation Development Undertaken Under The Pick-Sloan Plan Pursuant To Section 9(c)*

Section 9(c) states that "the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws." The two courts below appropriately read this provision to apply federal reclamation law to those projects assigned to Interior by the Pick-Sloan plans, and concluded that Oahe was not such a project. (Pet. App. 19a, 54a). However, relying on a dictionary definition of "development" that encompasses the act of "making usable or available," the government contends that "reclamation . . . developments" are not merely physical projects, but include industrial use contracts like the one Interior entered with ETSI. The government then invokes Section 9(c) of the Reclamation Projects Act of 1939 to demonstrate that industrial contracting is a "recognized reclamation use." Fed. Br. at 33.

This argument is plainly wrong. It is circular. Petitioners would have the ETSI contract justify itself. Thus, under their argument, the ETSI contract is said to be a "reclamation development" under Section 9(c); under Section 9(c), reclamation developments undertaken by Interior are governed by reclamation laws; and the reclamation laws authorize Interior, once it has undertaken a reclamation development, to market water from

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water marketing program. Petitioners' inability to set such a limit graphically illustrates the grave danger created by their theory: since they cannot define the block of water they wish to control, they cannot ensure existing users that there would be any reasonable limit placed on amounts diverted or on harm occasioned thereby. In this vein, it is instructive that when Reclamation Commissioner Broadbent recommended to the Interior Secretary that the ETSI contract be approved, he observed only that "the Bureau's water marketing program is *currently limited* to 1 million acre-feet." (J.A. 219.) (emphasis added.) Respondents' water experts testified in the proceedings below that withdrawals of the magnitude contemplated by the Interior program would occasion significant harm downstream. *See, e.g.*, Filing 315, J.A. 70 (affidavit of Thomas P. Ballestero at ¶ 17.)

that development for industrial uses. In short, petitioners would have the contract itself be the predicate for Interior's authority to enter into the contract. This is a logical fallacy.

Moreover, this entire argument depends upon an alleged difference in meaning between "developments" and "works." As is the case with the specious distinction between irrigation "features" and irrigation "works," the actual use of the terms demonstrates that they are synonymous.[26] The term "development" is simply preferred when speaking of hydroelectric power, and Section 9(c) concerns "reclamation and power developments."[27] In any event, Congress does not authorize or appropriate money for reclamation "developments"; such provisions refer instead to "works."[28]

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[26] The Interior spokesman who testified on the Flood Control Act clearly understood that the term "development" meant a physical work. *See House Hearings* (comments of Commissioner Bashore) at 289 ("[a]ll of our *construction* at the present time, with the exception of power projects and a few irrigation *developments*, is under stop-work orders . . . [W]e are preparing to resume *construction* on these irrigation *developments*.") (emphasis added). Moreover, the reclamation laws incorporated by Section 9(c) plainly apply to construction of projects. The 1902 Reclamation Act itself was meant to authorize the Interior Secretary to commence the *construction* of projects. *House Hearings* at 627. Similarly, the 1939 Reclamation Project Act was intended to provide a plan of payment of *construction* charges for reclamation projects. H. Rep. 995, 76th Cong., 1st Sess. 1 (1939). In fact, the Acting Interior Secretary wrote that Section 9(c) of the 1939 Act "relates to the *construction* of new projects, new subparts of projects and new supplemental works of projects." *Id.* at 5 (emphasis added).

[27] For example the Sloan Plan refers to power generated at hydroelectric "developments", obviously referring to particular projects or works. *See id.* at pages 16, 124, 136. Notably, the Federal Power Act, passed in 1920, defines "project" as a "complete unit of improvement or *development*, consisting of a power house" and various other structures. 16 U.S.C. § 796(11). (emphasis added).

[28] Section 9(a) only authorized the "initial stages," clearly referring to construction of works, and Section 9(e) consequently only appropriates money for "the partial accomplishment of the *works*

In addition, the federal reclamation laws only authorize Interior to supply water for non-irrigation uses from projects it has constructed.[29] Thus, the provisions of those laws authorizing Interior to contract for industrial purposes apply only to projects Interior otherwise controls, i.e., reclamation projects. Merely incorporating these provisions under the Flood Control Act does not grant Interior authority to control industrial uses at projects it did not construct, and does not operate.

B. Section 8 Applies Directly To The Missouri River Basin Projects Authorized In Section 9 And Limits Interior Authority At Those Projects Controlled By The Army Such As Oahe Reservoir

Neither ETSI, the government, nor the *amici* make any attempt to explain how their theory can be consistent with the plain terms of Section 8. Instead, they argue that Section 8 simply does not apply to projects authorized in Section 9. Though Section 8 is written to have

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to be undertaken under said plans by the Secretary of the Interior." Two years later Congress appropriated additional money for continuing those same "works." Act of July 24, 1946, Pub. L. No. 79-526 Section 18, 60 Stat. 653.

[29] Only where Interior has proceeded with irrigation from irrigation works is it provided the ancillary authority under reclamation law to make contracts for "miscellaneous" uses. Thus, Interior Secretary Ickes himself recognized that "industrial" uses are not "reclamation" uses. *Senate Hearings* at 312 (letter from Secretary Ickes to Senator Josiah Bailey) and at 457-458 (testimony of Secretary Ickes). (Pet. App. 59a.) Congress emphasized this fact in debates over the Act of February 25, 1920, 43 U.S.C. § 521 (App. 8a), which authorizes Interior to supply water for "other purposes than irrigation" from "any project irrigation system." ("The reclamation law, strictly speaking, does not allow them to use water for any other than irrigation purposes.") (Remarks of Rep. Taylor explaining the reason for the Act.) 66 Cong. Rec. 2980 (1920). Similarly, the language of Section 9(c) of the 1939 Reclamation Project Act itself speaks of "construction costs," and "operation and maintenance" costs, thus clearly contemplating that Interior build the works from which it supplies water for miscellaneous purposes. These provisions are quite consistent with Section 8 of the Flood Control Act, which limits Interior's authority to works it "construct[s], operate[s] and maintain[s]."

general application, they variously contend that it only applies to projects authorized in Section 10, or to future projects not authorized in the Flood Control Act at all. Fed. Br. at 28-29 n.45; ETSI Br. at 39; Amici Br. at 10 n.6. The infirmity of the government's argument is underscored by the fact that it argued precisely the opposite position below.[30] As for ETSI, it attempts to defend its interpretation, first, by concocting a novel reading of the term "Hereafter" that introduces Section 8, and second, by questioning why Congress would require Interior to obtain subsequent authorization for irrigation works contemplated in the Pick-Sloan plan. Both of these arguments utterly fail to support its reading of Section 8.

The language of Section 8 provides for general application to "*any* dam and reservoir project operated *under the direction of* the Secretary of the Army" (emphasis added). This language precisely tracks the language of Section 9(b), that authorized projects including Oahe to be prosecuted "*under the direction of* the Secretary of the Army." Nonetheless, ETSI contends that the initial term of Section 8, "Hereafter," limits its application to projects authorized under Section 10, or to future projects. ETSI Br. at 39. This reading of "Hereafter" is untenable for several reasons. "Hereafter" commonly means

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[30] In the court of appeals, the government relied squarely upon Section 8. *See* Fed. Ct. App. Br. at 7, 36-38. Here, however, the government attempts to avoid Section 8 by arguing that Section 9 adopts the Pick-Sloan plan, which in turn purportedly grants to Interior the authority to "administer the reclamation aspects" of Missouri Basin development. Fed. Br. 2, 21, 28-31; *see also* ETSI Br. at 10. It further suggests that Section 9's general "approval" of the Pick-Sloan plan is a "specific" provision which governs over the language of Sections 6 and 8. Fed. Br. at 28-29 n.45. Pages 22-25, *supra*, demonstrate that the government's argument is incorrect. But even if it were closer to the mark, the provisions of the federal reclamation laws show that the argument would not provide the basis for Interior's assertion of authority to execute the ETSI contract in the absence of irrigation works at Oahe. *See* n.29, *supra*.

"after this point in time" and simply denotes that the provision will have only prospective application. *See Black's Law Dictionary* 653, 5th ed. (1979). Thus, the U.S. Code has replaced the term "Hereafter" with the phrase "On and after December 22, 1944," the date of passage of the Flood Control Act. 43 U.S.C. § 390a.

The third sentence in Section 8 emphasizes this common sense reading. In that sentence, which was added to ensure that Section 8 would not affect a dispute at an existing Army reservoir (*See* 90 Cong. Rec. 8552-8553), "Hereafter" is used in contrast to "heretofore": dams and reservoirs not "*heretofore* constructed in whole or in part by the Army engineers," can be utilized "hereafter" only by complying with the terms of Section 8.

Thus, the Petitioners' reading of "Hereafter" is wholly untenable.[31] The most reasonable interpretation fully supports the application of Section 8 to projects authorized in Section 9. Indeed, the closing comments of Rep. Curtis of Nebraska upon passage of the Act demonstrate that Section 8 is integrally tied to Missouri Basin projects. (*See* 90 Cong. Rec. 9284-9285).[32]

However, ETSI argues that Congress would not have required subsequent authorization for irrigation works

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[31] Further proof that a common sense reading of "hereafter" is correct is provided by Section 7 of the Act, which is structured similarly to Section 8. (App. at 2a.) Like Section 8, Section 7 begins with the term "Hereafter." Under ETSI's reading of that term, Section 7 would apply *only* to Section 10 projects, or projects authorized in subsequent enactments. The Secretary of the Army thus would lack the authority to prescribe and enforce regulations for the use of water for flood control and navigation purposes at federally funded projects in the Missouri River Basin and elsewhere. Such a reading of "Hereafter" is absurd; it would strip the Army of the core authority that no one disputes: the authority to control flood control and navigation.

[32] The entire debate over the Act is riddled with exchanges demonstrating that Congress assumed both Section 8 and Section 6 to be integral parts of the Act. *See, e.g.*, 90 Cong. Rec. 4133-4134, 8548-8549 (discussions of interplay between Sections 6 and 8 in the context of Missouri Valley development).

already contemplated in the Pick-Sloan plan. ETSI Br. at 38-39. This contention ignores the purpose of the Congress to protect existing users of water; it also overlooks the historical context of the 1944 Act.

Congress intentionally designed Section 8 to limit Interior's unfettered discretion in water marketing by including protections for existing users of main stem Missouri River water similar to those enacted in Section 6. Thus, before the Interior Secretary can apply reclamation law to irrigation works at the Army's main stem reservoirs, Section 8 requires (1) Army's approval of the attendant water diversion, *and* (2) specific authorization of the irrigation work by the Congress. By freeing Interior from the need to obtain these prior approvals in this case, ETSI's theory would avoid these protections.

Moreover, this theory ignores important facts. The Flood Control Act was designed, in part, to provide a backlog of projects to ease unemployment after the end of World War II. (90 Cong. Rec. 4122). Aside from the uncertainty in December 1944 as to when the war would cease, Congress knew that there would be a predictable delay between initiation of project construction, and project completion.[33] Thus, Congress prudently withheld specific authorization until that future time when it could re-evaluate the economic need for large-scale irrigation. The effective deauthorization of irrigation works at Oahe in 1982 demonstrates Congress' skepticism over the need for irrigation there.

In conclusion, there is every reason to suppose that Congress meant what it plainly stated in Section 8.[34]

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[33] For example, the Corps' Colonel Reber advised the Congress that even after a dam was completed, it would take four or five years to fill the reservoir. *Senate Hearings* at 737. As it happened, Oahe itself was not completed until 1962. 128 Cong. Rec. 16610 at Table II (1982).

[34] The only authorities relied upon by petitioners to support the substance of their argument do not aid them. ETSI invokes *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D.

Certain dams authorized in Section 9 were to be operated under the direction of the Army. No irrigation could take place at these dams except under the provisions of Section 8, which required Interior first to receive Army approval and Congressional authorization, and then to build the additional works necessary for irrigation. Absent these events, Interior was granted no irrigation authority at such dams, and the reclamation laws do not apply.[35]

C. Section 6 Places The Authority To Define And Control "Surplus Water" Solely In The Army At Oahe Reservoir

Petitioners seek to avoid the plain force of Section 6 in two inconsistent ways. ETSI and the *amici* argue that

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Mont. 1976), *aff'd in part and rev'd in part sub nom, Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979). ETSI Br. at 21 n.14. However, the reservoirs in question there were constructed and operated by Interior, not the Army. (Pet. App. 54a.) ETSI additionally relies upon a 1958 opinion of the Attorney General, 41 Op. Att'y Gen. 377 (1958) ETSI Br. at 22. But the 1958 Attorney General opinion analyzed whether *irrigation* use was subject to the reclamation laws, even though additional irrigation works were not required. *Id.* at 377-378. Because the ETSI use would not constitute an "irrigation benefit" the Opinion does not aid ETSI here.

The government does not rely upon the Op. Att'y Gen., but both it and ETSI cite *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121, *reh'g denied*, 430 U.S. 976 (1977). Insofar as *Tulare Lake* could be read to suggest that the reclamation laws would apply to a Corps reservoir with an irrigation function, the Congress destroyed that inference in Section 8 of the Reclamation Reform Act of 1982. The Senate Committee Report on that Act makes it clear that the reclamation laws do not apply to Corps projects that lack irrigation works. S. Rep. No. 373, 97th Cong., 2d Sess. 16. (App. 22a-23a.) In addition, in the debate preceding passage of the Act, both Senator Johnston and Senator Cochran stated that Section 212(a) of the 1982 Act is designed to reject *Tulare Lake's* interpretation, and to make clear that the law was always to the contrary. 128 Cong. Rec. 16612-13 (1982). Therefore, that case has no precedential effect.

[35] As demonstrated at pages 41-42, *infra*, Congress re-confirmed this intention in the Reclamation Reform Act of 1982.

the Army lacks authority to supply "irrigation water" from Oahe, and that the water will be forever "locked up" by the decision below. The government contends, however, that both Army and Interior can and should be permitted to enter such contracts. In fact, neither of these positions is supported by the language, legislative history or policies of the Flood Control Act.

1. *The Army Has Sole Authority To Determine What Water Is "Surplus" And Available For Industrial Uses At Oahe*

ETSI, but not the government, contends that water "earmarked" for irrigation cannot be "surplus" under Section 6, and therefore, that unless the Interior can contract for such water, it will remain unused. ETSI Brief at 30 n.21.[36] However, as demonstrated at pages 22-26, *supra*, no water at Oahe is currently "reserved" for irrigation under Section 8. Moreover, in response to a question in debate, Senator Overton confirmed that under Section 6, the Army is empowered to determine whether there is surplus water at Army dams, to decide the amount thereof, and to dispose of that water. 90 Cong. Rec. 8231. And Representative Whittington stated that Section 6 of the Act was intended to "apply only to waters that were surplus and *not needed* for irrigation or other purposes." (emphasis added.) *Id.* at 4134. Under this definition, Section 6 plainly would allow Army to determine that the water petitioners now claim is not

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[36] ETSI incorrectly cites the remarks of Representative Curtis to argue that water at Oahe was "earmarked" for irrigation, and therefore could not be considered "surplus water" under Section 6 (which was numbered Section 4 in the House). ETSI Br. at 30 n.21. In his remarks, Representative Curtis answered the question whether water *appropriated under state statutes* for irrigation use can be considered "surplus water." He stated: "[*W*]*ater appropriated for irrigation* is not surplus water." 90 Cong. Rec. 4133 (1944). Those remarks do not suggest that the Act itself "earmarked," water for irrigation. To the contrary, they suggest that the procedure of appropriation is a necessary step in creating "irrigation water."

needed for irrigation at Oahe is in fact "surplus" and available for marketing.

ETSI also suggests that the Army's regulations defining "surplus water" prevent it from supplying any substantial amount of water for industrial use. ETSI Br. at 30 n.21. This contention, however, is not an argument that Section 6 does not grant authority to Army to contract for industrial use subject to the protections set out therein.[37] It is simply a complaint about the limitations ETSI perceives in Army's approach under the statute. But this complaint hardly justifies circumventing Section 6 by fabricating a concurrent authority in Interior. In any event, the Army General Counsel's recently-rendered opinion deprives these suggestions of any factual base.[38]

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[37] *Amici* separately suggest that the protections of Section 6 are overriden by the provisions of Section 1 of the Act. This argument is incorrect. Indeed, Sections 1(a) and 1(c) confirm the congressional intention to require consultation by Army and Interior with interests affected by the construction and operation of the Missouri River Basin projects. In addition, Section 1(b) plainly cannot be viewed as overriding the protections vested in Army in Section 6, particularly when its chief sponsor, Senator O'Mahoney, himself authored an amendment that would have granted Army complete control over all Missouri River Basin projects. 90 Cong. Rec. 8548 (1944).

[38] In this opinion (which is identified for the first time at Fed. Br. 38-39 n.58 and is reprinted in the Appendix to this brief), the Army General Counsel emphasizes the Army's authority under Section 6 of the 1944 Flood Control Act: (1) to declare all waters at Army reservoirs that he deems are not needed to fulfill an authorized project purpose to be "surplus" waters available for industrial use; and (2) to make reasonable reallocations of waters currently being used for authorized project purposes (such as hydropower) for sale for industrial use. (App. 13a-15a.) This new opinion shows that while the Army believes the Interior Secretary cannot act independently to market Oahe water for industrial use (J.A. 135 n.*), the Army also believes itself to be free under Section 6 unilaterally to provide for such use even if the water so used would otherwise serve an authorized project purpose. Subject to the provision in Section 6 that requires Army to protect existing uses of the Missouri River, this new Army interpretation clearly would

2. *Concurrent Authority Over Industrial Uses Would Destroy The Congressional Division Of Authority At Main Stem Dams*

Recognizing that the Army is authorized to contract for precisely the same use that Interior seeks to control, the government attempts to defend a system of concurrent authority. Fed. Br. at 37-39. However, granting two agencies the authority to contract for the same use of the same water would be not only manifestly impractical, it would violate the division of authority established by the Congress.

First, rather than "maximiz[ing] the effectiveness of the multiple purpose reservoirs," Fed. Br. at 39, concurrent jurisdiction would create an unstable management, where neither agency has the final say on whether "surplus" water exists, and whether a contract for its industrial use is desirable. As Senator Overton's comments make clear, the right to define "surplus" water is a necessary incident of main stem reservoir control properly vested in the Army by Section 6. (90 Cong. Rec. 8231). Senator O'Mahoney confirmed Army's right to control "disposal of waters behind dams it has built" in 1952 when Congress re-enacted Section 6 to correct an inadvertent repeal. 98 Cong. Rec. 3802 (1952). In fact, Army currently exercises that right in its daily opera-

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allow water stored behind the main stem dams and not in use for irrigation to be used for industrial purposes.

Army's new interpretation of the term "surplus" water under Section 6 resolves an "essential difference" between the majority and the dissent in the court of appeals. (Pet. App. 43a n.7.) As to the undeniable impact of this new opinion, the government can only say that Army has not "to date" acted upon it at Oahe. Fed. Br. at 38-39 n.58. But this assertion does nothing to avoid the fact that in this new opinion Army has plainly asserted its intention to accommodate the use for which Interior seeks implied competing authority under the Act. Thus, contrary to the government's contention, Fed. Br. at 49, there simply is no need for Interior to decide whether it has the unilateral authority it seeks here; Army plainly believes that it (and not Interior) has that authority, and Army intends to use it.

tional control over the main stem reservoirs. (See pp. 12-13, *supra*).

Further, the fact that the two agencies are guided by different statutory concerns ensures inter-agency disputes over such water contracts. Interior must only consider whether a water supply contract would impair the function of irrigation, whereas the proviso to Section 6 requires the Army to determine more generally whether the contract would "adversely affect then existing lawful uses" of water. *Compare* 43 U.S.C. § 521 *and* 43 U.S.C. § 485h(c), (App. 6a, 8a), *with* 33 U.S.C. § 708 (App. 2a). Obviously, a water supply contract may not impair local irrigation by Interior (especially at Oahe, where there is no Interior irrigation) but may still adversely affect other uses, such as downstream consumption. But under petitioners' theory of concurrent jurisdiction, Interior would remain free to conduct its activities at Oahe without regard to their effect on the activities which impelled construction of the dam, certainly not the result Congress contemplated when enacting the Section 6 protections.[39]

III. The Legislative History Of The 1944 Act, As Well As Subsequent Actions Of The Congress, Confirm That The Interior Secretary Lacks The Authority He Seeks

The plain language of the Flood Control Act of 1944 settles the question presented here. Therefore, examination of the legislative history is appropriate to determine "only whether there is 'clearly expressed legislative intention' contrary to that language." *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1213 n.12 (1987) (citations omitted). In this case, the legislative history of Interior's failed efforts to amend Sections 6 and 8 of the 1944 Act strongly confirms that the Act does not authorize Interior to execute the ETSI contract. Moreover, in the Reclama-

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[39] The court of appeals so concluded: "It seems incongruous, however, to hold that, in a statutory scheme which attempts to demarcate the jurisdiction of agencies with potentially competing interests, Congress would authorize both agencies to contract for water from the same pool for industrial purposes." (Pet. App. 31a.)

tion Reform Act of 1982, the Congress rejected the petitioners' theory that reclamation law can apply implicitly to Army reservoirs which lack Interior irrigation works.

A. Congress Rejected Efforts By The Interior Secretary And His Allies To Amend Section 6 And Obtain The Authority He Now Seeks During Deliberations Over The 1944 Act

The Interior Secretary was specifically denied authority of the type he now seeks during congressional deliberations on Section 6 (which was numbered Section 4 in the House). In a June 2, 1944 letter to the Senate Commerce Committee, Interior Secretary Ickes requested that a specific provision be added to the end of Section 6 in order to secure authority for Interior to market surplus water for industrial uses from Army reservoirs used for irrigation.[40] This provision, however, was not included in the 1944 Act. Petitioners so concede. Fed. Br. at 10 n.15 and 11 n.17; ESTI Br. at 43.[41]

Additional legislative history of Section 6 also makes it clear that the Interior Secretary lacks the authority he now seeks. For example, the House defeated an amendment that was even more expansive of Interior authority

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[40] Interior's proposed language read as follows:

Provided, That the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pursuant to section 6 of this Act . . . . Senate Hearings at 312-313 (Letter from Harold I. Ickes, Secretary of the Interior to Senator Josiah W. Bailey, Committee on Commerce, June 2, 1944).

[41] ETSI notes that Interior Secretary Ickes did not pursue this amendment after Senator Overton reminded him that language covering the applicability of reclamation law had already been inserted in the companion Rivers and Harbors Bill (in an amendment identical to Section 8). *See Senate Hearings* at 458. However, ETSI's conclusion—that the Senate had no intention to deny the Secretary that authority—is flatly belied by the subsequent floor debate over the Rivers and Harbors bill itself. In that debate, Senator Overton stated that the intention of Section 8 was to prevent Interior from initiating any work at Army reservoirs to dispose of surplus water without prior Congressional authorization. 90 Cong. Rec. 8675 (1944).

than the one later rejected by the Senate. This amendment provided that the reclamation laws would govern the use of waters for industrial purposes at any reservoir (such as Oahe) located west of the 97th meridian. 90 Cong. Rec. 4197 (1944). But Representative Whittington attacked the amendment, and it was rejected on the House floor. *Id.*

The Senate also rejected an amendment proposed by Senator Murray of Montana which would have shifted control of Oahe and other Missouri Basin Army projects to the Bureau, and would have applied the reclamation laws to *all* activities, not just irrigation. *Id.* at 8616, 8626.

The uniform rejection of these amendments demonstrates that Congress did not intend to authorize the Interior Secretary to undertake actions such as the ETSI water service contract.[42] *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200-01 (1974); *See National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971) (congressional rejection of limiting amendment clearly reflects legislative intent).

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[42] The government and ETSI argue that Interior already enjoyed authority to market water for industrial use at Army reservoirs, and that the defeat of the Secretary's amendment merely denied the agency's effort to obtain exclusive authority. Fed. Br. at 47-48 n.71; ETSI Br. at 18-19, 43-44. This is flatly incorrect. In explaining the House version of Section 6, Representative Whittington stated that "under the reclamation acts and in the distribution of water under those acts, *the Secretary of the Interior has the power to do in reclamation districts just what the Chief of Engineers would have power to do [under Section 6] in reservoir districts.* This is to make *comparable* the powers exercised by the Director of Reclamation and engineers." 90 Cong. Rec. 4134 (1944). (Emphasis added.) Later, Representative Whittington emphasized that "the purpose of [Section 6 of the Act] in no way involves reclamation." *Id.* at 4197.

In addition, when Congress re-enacted Section 6 in 1952 (to correct an inadvertent repeal), Senator Case stated that the Section "put the Secretary of [Army] . . . *on all fours with the Secretary of the Interior with respect to their power to deal with dams and reservoirs under their control.*" 98 Cong. Rec. 3801-3802 (1952) (emphasis added).

B. Congress Designed Section 8 Of The 1944 Act To Avoid A Grant Of Authority To The Interior Secretary Over A Block of Water Stored At Army Reservoirs

The legislative history of Section 8 is equally devastating to the petitioners' argument. Drafted in the House (and numbered Section 6 there), this Section originally would have granted Interior express authority to "prescribe regulations under existing reclamation law for the use of storage" in Army reservoirs. The Senate, however, radically narrowed the scope of Interior's authority in amending House Section 6 and formulating Section 8 of the Act. See 90 Cong. Rec. 8233-8241, 9279 (1944).[43]

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[43] The differing House and Senate versions of Section 8 of the Act follow:

Section 6 of the House Bill *(deleted by the Senate)*	Section 8 of the Senate Bill *(substituted for House Section 6 and enacted into law)*
Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary can be consistently used for reclamation of arid lands, *it shall be the duty of the Secretary of the Interior to prescribe regulations under existing reclamation law for the use of the storage available for such purpose*, and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said storage; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts.	Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, *the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws* (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof), *such additional works in connection therewith as he may deem necessary for irrigation purposes.* Such irrigation works may be undertaken only . . . after subsequent specific authorization of the Congress by an authorization Act . . . .

Misapprehending Sen. Overton's observation that Section 8 allows Interior merely to *distribute* irrigation water, (90 Cong.

Both the district court and the court of appeals noted the significant difference between these two versions, and concluded that they demonstrate the limited authority of the Interior Secretary at Army reservoirs. (Pet. App. 26a-27a; 60a-61a.) The provision proposed by the House focuses on extending the Secretary's power over water stored in the reservoirs; in the provision actually adopted (Section 8), the focus shifts completely out of the reservoirs, to the works needed to distribute water, and a requirement for prior specific congressional authorization is added.[44] Since the Senate version prevailed in confer-

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Rec. 8625-2626), the petitioners rely extensively on the debate over the rejected House version of Section 8. Fed. Br. at 8 n.11, 25-26 and nn.42-43; ETSI Br. at 17, 42 n.32. But statements on the House floor of members' intention to authorize Interior control over storage are of no value in light of the very significant amendment of that Section in the Senate. If anything, they provide excellent indications that the statute as passed did not contain such a grant. *Interstate Natural Gas Co. v. FPC*, 156 F.2d 949, 952 (5th Cir. 1946), *aff'd* 331 U.S. 682, *reh'g denied*, 332 U.S. 785 (1947).

[44] Petitioners argue that Section 8 was recommended by the Interior Secretary for "technical" or "clarification" reasons, and imply that the adoption of Section 8 thus cannot logically be interpreted to limit his authority. Fed. Br. at 11 n.17, 28 n.45, 47-48 n.71; ETSI Br. at 40-41. This suggestion, too, is plainly incorrect. Indeed, Congress made a significant change in the language of Section 8 that had been proposed by Interior: it inserted the requirement of subsequent *specific* congressional authorization for any further works constructed by the Secretary. *Compare* proposal of Secretary Ickes at *Senate Hearings* at 313 *with* Section 8 (App. 2a-3a). Although Senator Overton noted that Section 8 as proposed by the Senate faithfully reflected the changes proposed by the Interior Secretary, 90 Cong. Rec. at 8314-8315, he also emphasized that the version proposed by Secretary Ickes had not provided for prior congressional authorization in a colloquy with Senator Hatch during discussion of the terms of Section 8 as they were inserted *verbatim* into the companion Rivers and Harbors Bill. *Id.* at 8674-8675. For a frank acknowledgement that the substitution of Senate Section 8 for House Section 6 was "controversial," see the comment of Senator Milliken at 90 Cong. Rec. 8233.

ence, the Senate's intent is controlling.[45] These significant alterations destroy the argument here that the Interior Secretary now enjoys authority to control and dispose of the water stored in Army reservoirs. *See Cardoza-Fonseca*, 107 S.Ct. at 1215 n. 17 (where provision relied upon for statutory construction was rejected, that language does not govern); *Pan Am World Airways, Inc. v. CAB*, 380 F.2d 770, 781 (2d Cir. 1967), *aff'd* 391 U.S. 461, *reh'g denied*, 393 U.S. 957 (1968) (specific rejection of one house's version in final adoption is "extremely significant.")

C. Congress Rejected Any Inference That Interior Could Exercise Control Over Army Reservoirs In The Absence Of Explicit Statutory Language Or The Construction Of Irrigation Works In The Reclamation Reform Act Of 1982

Following extensive efforts, Congress enacted the Reclamation Reform Act of 1982, P.L. 97-293, 96 Stat. 1261, in order to provide "a modern statement of congressional policy on the programs and related administrative efforts carried out pursuant to the Federal reclamation law." S. Rep. No. 97-373, 97th Cong., 2d Sess. (1982) 6-7 (App. 21a). That Act administers the legislative *coup de grace* to the petitioners' theory that the reclamation laws apply to Oahe.

A chief purpose of the 1982 Act was to resolve a controversy that had arisen under Section 8 of the Flood Control Act of 1944. *Id.* at 11 (App. 21a). In the 1982 Act the Congress rejected efforts by Interior to apply reclamation law to irrigators who were drawing water from Army reservoirs. In so doing Congress underscored its intention that Section 8 of the 1944 Act was *not* to be construed to allow reclamation law to apply at such reservoirs absent explicit statutory designation of that reser-

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[45] According to the Conference Report, the House's language was rejected and the Senate's language was adopted and became Section 8 of the 1944 Act. Conference Report, 90 Cong. Rec. 9279 (1944) (Amendment No. 17).

voir as a reclamation project, or absent the construction of project irrigation works. 43 U.S.C. § 390*ll*(a)(1), (2). (App. 7a.)[46]

Thus, the 1982 Congress confirmed that, under Section 8 of the 1944 Act, the authority of Interior to apply reclamation law at Army projects in the absence of explicit statutory language is entirely dependent upon the question whether Interior has constructed irrigation works. (Pet. App. 30a n. 21.) As it is not disputed that no such works have been constructed at Oahe, Interior cannot exercise any industrial water marketing authority under the reclamation law at that reservoir, and the ETSI contract is invalid.[47]

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[46] The Senate Report accompanying the 1982 Act emphasizes Congressional intent that "Section 8 of the Flood Control Act of 1944 did not, in and of itself, make the reclamation law applicable to any specific project." (App. 22a.) It also states its purpose "to eliminate the shadow of applicability of reclamation law to Corps of Engineers projects in any case in which the intent of Congress concerning such applicability is not clearly and explicitly set forth in statutory language." (App. 23a.)

[47] The petitioners suggest that Section 212(b) of the Reclamation Reform Act of 1982 indicates congressional assent for the exercise of Interior authority at Oahe. Fed. Br. at 48-49 and n.72; ETSI Br. at 26-27. This suggestion ignores both the language of the Act and its legislative history. The Act first defines "*irrigation water*" as "water made available *for agricultural purposes from the operation of reclamation project facilities.*" 43 U.S.C. § 390 bb(5) (emphasis added). (App. 21a.) The Committee Report then explains that Section 212(b) "has been included in the bill to insure that the Secretary's authority to contract with water user entities for the *irrigation water* deliveries from Corps of Engineers projects . . . continues in effect." S. Rep. No. 97-373 at 16 (emphasis added). (App. 23a.) Thus, in Section 212(b), the Congress merely confirmed Interior's authority to market water from irrigation facilities for agricultural use. Furthermore, neither Interior nor the Army provided comments that would have alerted the 1982 Congress to the ETSI contract. Commissioner Broadbent's statements suggest only that Interior's authority to contract for *irrigation water* supplies would remain intact—the same point covered in 212(b). 128 Cong. Rec. 16607 (1982). General Heiberg's May 18 and June 18, 1982 letters were both written *prior* to execution of the ETSI contract, and in any event noted only that "the

IV. The Interpretation Of The Flood Control Act of 1944 Advanced By The Interior Secretary Is Not Entitled To Deference For The Reason That It Conflicts Squarely With The Act's Plain Language And Legislative History As Well As With Contrary Interpretations By The Army And By Interior Itself

As a final effort to validate the ETSI contract, the petitioners argue that Interior's interpretation of Section 9 of the Flood Control Act of 1944 is entitled to deference. Fed. Br. at 44-50; ETSI Br. at 32-37. But this is not a case in which the deference principle applies.

This Court has repeatedly made clear that deference to an agency interpretation of statutory language is appropriate where three conditions are met: first, the statute being construed must lack any clear guidance on the issue; second, the agency offering the interpretation must enjoy unquestioned authority to administer the program in question; and third, the agency's construction must be permissible, reasonable and consistent with the statute itself. *E.g., Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, *reh'g denied*, 468 U.S. 1227 (1984); *Japan Whaling Association v. American Cetacean Society*, No. 85-954, slip op. at 11 (U.S. June 30, 1986). Not one of these conditions is satisfied in this case.

Thus, as an initial matter, Section 6 of the 1944 Act speaks directly to the precise issue presented here by declaring that it is the Secretary of the Army (not the Interior Secretary) who enjoys the authority to market for industrial use water that is considered surplus to main stem project purposes. Given this fact, it is the Army, not Interior, that has been unambiguously empowered by the 1944 Act to make determinations as to the availability of water at Oahe for industrial use.[18]

United States" (not the reclamation fund) would receive revenue from industrial water contracts from main stem reservoirs. *Id.* at 16610. Thus, his letters could not possibly have referenced the ETSI contract, as ETSI states, nor could they be construed as notifying the Congress that Interior, rather than Army, was contract-

In the teeth of Section 6, ETSI (but not the government) argues that the Congress never considered the issue of how to dispose of "unused irrigation water." ETSI Br. at 33-34.[49] This argument ignores the statements of Senator Overton and Representative Whittington that show Congress fully intended that water not used for irrigation be considered "surplus" under Section 6. 90 Cong. Rec. 8231, 4125 (1944). In fact, Rep. Whittington expressly stated that Section 6 of the Act "would apply only to waters that were surplus and not needed for irrigation and other purposes." 90 Cong. Rec. 4134 (1944). As the 1986 Army General Counsel opinion concludes after examining these passages from the congressional debates, water from a main stem Missouri River reservoir that is not currently in use for irrigation "*surely* can be considered surplus water within the meaning of Section 6." (emphasis added). (App. 14a-15a.)

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ing for industrial use, or as advising the Congress of the statutory basis for such contracts.

[48] Surely, the Interior Secretary recognized this fact in 1975 when he felt constrained to enter into the MOU with the Army. If the Army had no such Section 6 power, and if Interior was as confident then as it claims to be now of its implied Section 9 authority, Interior presumably would have felt no need to sign the MOU. (*See* Pet. App. 68a.)

[49] ETSI asserts that Congress never defined the term "reclamation developments," and reduces the "precise question" in this case to the question "whether . . . developments should include stored irrigation water in the absence of irrigation works." ETSI Br. at 33. Aside from the plethora of legislative history that illustrates the understanding of Congress and Interior that the term "reclamation developments" meant physically-constructed projects (not mere storage of undefined quantities of water), see pp. 26-27, *supra*, this analysis misses the point altogether. Plainly, the central question in this case is whether the Congress authorized Interior to market water for industrial uses from Army reservoirs in the absence of Interior irrigation works. Congress answered that question decisively in the negative in Sections 6, 8 and 9. ETSI's approach simply ignores the maxim that statutes must be read consistently as a whole, without placing excess emphasis on any one provision or phrase. *United States v. Morton*, 467 U.S. 822, 828, *reh'g denied*, 468 U.S. 1228 (1984); *Van Dyke v. Cordova Copper Co.*, 234 U.S. 188, 191 (1914).

Nor is Interior empowered with unfettered discretion to administer any plan for industrial use of water from main stem reservoirs such as Oahe. To the contrary, as demonstrated in Parts I and II, and wholly aside from the clear grant of such power to the Army in Section 6, any grant of such authority to Interior arising from Section 9 is inferential at best, and is in any event constrained by the procedures of Section 8 requiring prior Army approval and Congressional review.[50] Moreover, such an inference produces irreconcilable conflicts with the central intention of Congress in 1944 to divide authority between the Army and Interior, to prevent overlapping jurisdiction over projects in the Missouri River Basin, and to protect existing users of water.

In addition, the construction advanced by Interior has been challenged consistently by the Army. In 1974, the Acting Army General Counsel stated that Interior did not

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[50] This fact plainly distinguishes the cases relied upon by petitioners. Unlike this case, in the petitioners' cases the statute under review unequivocally empowers the agency offering the interpretation to administer the program in question. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 106 S.Ct. 1931, 1935, 1938-39 (1986) (review of FDIC interpretation of its enabling laws); *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 457 and n.7 (1986) (review of Corps interpretation of Clean Water Act provision that expressly empowered Corps to control permits affecting wetlands); *Chemical Manufacturers Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 118 n.2 (1985) (review of EPA interpretation of provision of Clean Water Act that expressly directed EPA to administer its terms). For example, in the case cited prominently by ETSI, *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986), this Court deferred to an interpretation by the CFTC of its own enabling statute (the Commodities Exchange Act) only after noting that the interpretation was a "longheld position" which was "well within the scope of its delegated authority." *Id.* at 3254. Similarly, in *United States v. City of Fulton*, 106 S.Ct. 1422 (1986), this Court deferred to an interpretation of Section 5 of the 1944 Flood Control Act by the Secretary of Energy after emphasizing that there was no question concerning the existence of his authority to administer the program under review. *Id.* at 1426-1427. In this case, the existence of that authority is precisely the question presented.

enjoy independent authority to market water for industrial use without Army approval. (J.A. 135 n. *.) In 1975, Secretary of the Army Callaway advised Interior Secretary Morton that the authority question was in need of congressional clarification. (J.A. 142.) In connection with consideration of the provision of the Reclamation Reform Act of 1982 that rejects Interior's theory, the Deputy Assistant Secretary of the Army for Civil Works advised the Congress that "[i]t is the position of the Department of the Army that [43 U.S.C. § 390*ll*] is a concise statement of the scope of coverage that Congress has consistently intended for Federal reclamation requirements at Corps of Engineers projects." Letter of July 15, 1982 from Robert F. Dawson to Senator McClure (128 Cong. Rec. 16614 (1982)). More recently, the 1986 Army General Counsel opinion reemphasizes the Army's power to market water for industrial use from main stem reservoirs.[31] (App. 12a-15a.) Under these circumstances, Interior's construction of the 1944 Act plainly does not warrant deference.

Petitioners argue at length that the Flood Control Act was designed to promote flexible development of water resources in the Missouri River Basin, Fed. Br. at 4-6, 15-16, 36; ETSI Br. at 15-16, 29, and note that the Interior Secretary was directly involved in its creation. These facts, however, say nothing about *how* such development was to proceed, nor about the importance of clearly dividing authority between the Army and Interior to ensure an efficient development plan that would protect existing uses on the main stem of the Missouri.[32]

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[31] The government now suggests in passing that the ETSI contract is "acceptable" to Army. Fed. Br. at 46. This suggestion is inconsistent with Army's previously expressed views, which correctly recognize its duties under Section 6 and Section 8, and ignores the fact that Army has not delegated its authority to Interior. (*See* Pet. App. 15a-17a and n.9, 70a.) In short, this suggestion cannot rescue the *ultra vires* ETSI contract. *Id.*

[32] Notably, while promoting "optimal development", ETSI and the government are conspicuously silent on the congressionally

Nor do they explain the specific rejection by Congress of the Interior Secretary's efforts to amend Sections 6 and 8 to provide him the authority he now seeks.[53] That rejection precludes deference here. *See Cardoza-Fonseca*, 107 S.Ct. at 1215 n. 17.

Petitioners also suggest that Interior has consistently advanced the position it now argues. Fed. Br. at 47-48; ETSI Br. at 20-24. This suggestion simply is not correct. Opinions and statements authored by Interior officials in 1946, 1950, 1957 and 1981,[54] as well as the execution of

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recognized need to protect existing users from withdrawals occasioned by industrial use. Instead, they complain that the rulings below would require the construction of "pointless" irrigation works as a prerequisite to Interior's assertion of industrial water marketing authority. ETSI Br. at 30. *See* Fed. Br. at 38. These contentions, too, miss the point. Congress plainly required specific authorization of such works in Section 8 as a prerequisite to the exercise of Interior authority at Army reservoirs precisely to prevent the sort of unfettered power to promote industrial diversions of the type the petitioners seek here. Indeed, the reclamation laws themselves, as underscored in the Reclamation Reform Act of 1982, show that the Congress considers the presence of Interior-constructed irrigation works to be a key factor in determining whether Interior can apply the reclamation laws. (See pp. 41-42, *supra*.)

[53] Inexplicably, the government states that "there is no reason to doubt" that Reclamation Commissioner Bashore and Interior Secretary Ickes expected that Pick-Sloan approval granted "authority over water stored for irrigation at the main stem reservoirs." Fed. Br. at 47. To the contrary, there is *every* reason to doubt this assertion. Commissioner Bashore specifically advised the Congress during hearings in 1943 on H.R. 4485 that it was the Bureau's intention merely to seek to exercise jurisdiction over reservoir water *after* it was released to the distributing system. *House Hearings* at 646. And Secretary Ickes' repeated but unsuccessful efforts to obtain such authority speak for themselves.

[54] The Bureau's Assistant Chief Counsel declared in a 1946 opinion that the provisions in Section 9(c) refer "exclusively to power developments undertaken by the Secretary of the Interior *at dams which he is authorized to construct.*" *See Missouri Basin*

the MOU itself in 1975, contradict the claim advanced here (*see* Pet. App. 68a). This lack of internal agency consistency further undermines Interior's claim to deference. *Cardoza-Fonseca*, 107 S.Ct. at 1221 n. 30.

Even the unpublished 1974 memorandum from the Interior Solicitor which constituted the only stated basis for execution of the ETSI contract provides little comfort. That opinion was a conclusory interpretation advanced thirty years after passage of the Act that failed to mention the express grant of authority to the Army contained in Section 6, the provisions of Section 8, or the failed efforts by Secretary Ickes to obtain similar authority. Accordingly, that opinion provides no basis for deference. *See Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 745-746 (1973).

As for the claim that Congress somehow approved the ETSI contract in 1975 hearings, that contention is groundless. The 1975 hearings were in large part a con-

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Water Problems: Joint Hearings Before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Public Works, 85th Cong., 1st Sess. Pt. 1 (1957) 367, 390 (emphasis added). Likewise, the Interior Solicitor stated in a 1950 opinion that "subsection (a) of Section 9 was intended *only* to allocate the construction of the several parts of the Missouri River Basin project between the Bureau of Reclamation and the Corps of Engineers; that subsection (b) was intended to apply to the parts of the projects which were to be constructed by the Corps of Engineers; and that *subsection (c) was confined to the parts of the project which were to be constructed* by the Secretary of the Interior." *Id.* at 369. (emphasis added.) In 1957, Interior's Assistant Solicitor advised the Congress that Interior did not consider the main stem reservoirs to be "reclamation developments" constructed by the Bureau. *Id.* at 318-319. And in 1981, Reclamation Commissioner Broadbent advised Congress that: ". . . Under Section 8 of the [1944] Flood Control Act, *only projects that provide irrigation benefits are subject to Reclamation law.*" *Reclamation Reform Act of 1981: Hearings Before the Senate Committee on Energy and Natural Resources*, 97th Cong., 1st and 2d Sess. (1981-1982) 569 (letter from Commissioner Broadbent) (emphasis added).

certed attack on Interior's assertion of authority to market water from main stem reservoirs for industrial use.[55] Thus, contrary to the petitioners' suggestion, the 1975 hearings simply did not approve the Secretary's alleged authority. In fact, by contrast to the congressional silence that followed the 1975 hearings, enactment of Section 212(a) of the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll*(a), suggests that Congress has conclusively rejected the petitioners' theory. *Schor*, 106 S.Ct. at 3255.

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[55] During the hearings, Senator Abourezk questioned representatives of the Department of the Interior closely concerning their authority to market water from the upper Missouri Basin, and expressed a belief that such authority might be "subject to legal challenge." *Missouri River Basin Industrial Water Marketing: Hearing Before the Senate Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975) at 50-51. (*See* Pet. App. 35a.) Even if the text of those hearings were more helpful to their argument, it is well settled that testimony given to congressional committees should be given little weight, *see Sierra Club v. Clark*, 755 F.2d 608, 617 (8th Cir. 1985), and that after-the-fact congressional observations normally are given short shrift in statutory construction. *CPSC v. GTE Sylvania*, 447 U.S. 102, 117-18 (1980). Similarly, mere committee review does not constitute congressional authorization. *TVA v. Hill*, 437 U.S. 153, 191-92 (1978); *SEC v. Sloan*, 436 U.S. 103, 120-122 (1978); *see Libby Rod and Gun Club v. Poteat*, 594 F.2d 742, 746 (9th Cir. 1979). For these reasons, the 1955 comment from the Senate Committee on Interior and Insular Affairs concerning the purported authority of the Interior Secretary over irrigation storage, interjected during consideration of matters entirely unrelated to that question, Fed. Br. at 49, does not change the contemporaneous legislative history showing that Interior lacks authority under the 1944 Act to regulate such storage. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (comments in committee report written eleven years after enactment of the legislation in question insufficient to overcome clear evidence of congressional intent at time of enactment.)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Sections 5 through 9 of the Flood Control Act of 1944:

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the authorization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quanties for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any res-

ervoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided*, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to

irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands,

and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

APPENDIX B

Section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. § 485h(c)):

> (c) Furnishing water to municipalities; sale of electric power; lease of power privileges

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to coopera-

tives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 [7 U.S.C.A. § 901 et seq.]. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

APPENDIX C

Section 212 of the Reclamation Reform Act of 1982 (43 U.S.C. § 390*ll*):

§ 390*ll*. Corps of Engineers projects

(a) Applicability of Federal reclamation laws

Notwithstanding any other provision of law, neither the ownership or pricing limitation provisions nor the other provisions of Federal reclamation law, including this subchapter, shall be applicable to lands receiving benefits from Federal water resources projects constructed by the United States Army Corps of Engineers, unless—

(1) the project has, by Federal statute, explicitly been designated, made a part of, or integrated with a Federal reclamation project; or

(2) the Secretary, pursuant to his authority under Federal reclamation law, has provided project works for the control or conveyance of an agricultural water supply for the lands involved.

(b) Payment of construction, operation, maintenance and administrative costs allocated to conservation or irrigation storage

Notwithstanding any other provision of this section to the contrary, obligations that require water users, pursuant to contracts with the Secretary, to repay the share of construction costs and to pay the share of the operation and maintenance and contract administrative costs of a Corps of Engineers project which are allocated to conservation storage or irrigation storage shall remain in effect.

APPENDIX D

Act of February 25, 1920 (43 U.S.C. § 521)

SUBCHAPTER XIII—SALE OR LEASE OF SURPLUS WATERS, WATER POWER, STORAGE CAPACITY, AND WATER TRANSPORTATION FACILITIES

§ 521. Sale of surplus waters generally

The Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided*, That the approval of such contract by the water-users' association or associations shall have first been obtained: *Provided*. That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: *Provided further*, That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further*, That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied.

(Feb. 25, 1920, c. 86, 41 Stat. 451.)

APPENDIX E

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20310

13 March 1986

SAGC/Mr. Hoskins/pmd

MEMORANDUM FOR THE ASSISTANT SECRETARY
OF THE ARMY
(CIVIL WORKS)

SUBJECT: Proposed Contracts for Municipal and Industrial Water Withdrawals from Main Stem Missouri Reservoirs

This responds to your memorandum of 25 October 1985, requesting my views on the adequacy of two water withdrawal contracts. The contracts grant the city of Parshall, North Dakota (Parshall) and the North Dakota State Water Commission (NDSWC) privileges to withdraw water from Lake Sakakawea for municipal and industrial purposes.

Lake Sakakawea was formed by the waters of the Missouri River stored behind the Garrison dam. The Garrison dam is one of six Missouri main stem dams authorized by section 9(a) of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887. Pursuant to section 9(a), more commonly referred to as the Pick-Sloan Missouri River Basin Program, the six main stem dams are operated as a coordinated unit providing flood control protection, storage to enhance downstream navigation during prolonged droughts, hydropower storage, and storage of waters for irrigation.

The contracts provide that at a future date Parshall and NDSWC will agree to pay reasonable consideration

based upon benefits received. It is my understanding that the consideration will amount to a charge for reservoir storage needed to fulfill the withdrawal demands of Parshall and NDSWC. Parshall and NDSWC, as well as any future local users, will be charged only for storage that exceeds the amount of water that would have been provided by the natural flow of the Missouri River had the Pick-Sloan reservoirs not been constructed.

In my opinion section 6 of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, *codified at* 33 U.S.C. § 708, authorizes your office to enter into the proposed contracts with Parshall and NDSWC. Section 6 provides that:

> The Secretary of the Army is authorized to make contracts with states, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

At issue in the Parshall and NDSWC contracts is whether surplus water exists in Lake Sakakawea. Certain legal opinions from the Corps of Engineers suggest that water in the main stem reservoirs would not be available for municipal or industrial purposes so long as the water is otherwise being used, or could be used, for the purposes specifically identified in the Pick-Sloan program. Under this analysis there is no surplus water in Lake Sakakawea because all water not actually needed for irrigation or otherwise held within the reservoirs for navigation purposes, could eventually be discharged through the generators to produce hydroelectric power.

In my opinion, this interpretation of what constitutes surplus water is unnecessarily narrow. Under the authority of section 6 of the Flood Control Act, your office, acting for the Secretary of the Army, has broad discretion in marketing waters trapped in Corps of Engineers rservoirs. Congress made clear that section 6 of the Flood Control Act would give the Secretary of the Army authority equivalent to the authority of the Bureau of Reclamation pursuant to the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c). During congressional debate over section 6 of the Flood Control Act of 1944, the House bill's sponsor explained the purpose of section 6 as follows:

> Section [6] provides that if there is a town or a city or a municipality that needs an additional water supply—and water is just as essential for human beings as it is for crops—the [Secretary of the Army] shall have the right to provide that that water shall be used there for the purpose of supplying the needs of man. It strikes me that the provision is a power that now obtains under the reclamation law. If it obtains under the reclamation law, I know of no good reason why it should not obtain in the existing bill.

90 Cong. Rec. 4125 (daily ed. May 8, 1944) (statement of Rep. Whittington). Later in the debate Congressman Whittington added the following:

> My recollection is that under the reclamation acts, and in the distribution of water under those acts, the Secretary of the Interior has the power to do in reclamation districts just what the [Secretary of the Army] would have power to do in reservoir districts. *This [section] is to make comparable the powers exercised by the Director of Reclamation and the [Secretary of the Army] and would apply only*

> *to waters that were surplus and not needed for irrigation or other purposes.*

Id. at 4134 (emphasis added).

Federal reclamation law grants the Secretary of the Interior broad discretion in marketing water stored in Bureau of Reclamation reservoirs and electric power produced at those reservoirs. Section 9(c) of the Reclamation Projects Act of 1939, P.L. 76-260, authorizes the Secretary of the Interior to enter into contracts for municipal water supply and the sale of electric power or lease of power privileges. 43 U.S.C. § 485h(c). This authority is limited by the requirement that "[n]o contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." *Id.*

This provision has been interpreted to authorize the Secretary of the Interior to sell to municipal and industrial users water that was originally intended for use in irrigation but is not presently needed for that purpose. *See Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976) *reversed on other grounds Environmental Defense Fund v. Andrus*, 596 F.2d 848 (9th Cir. 1979); *see also State of Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984); *Review of Federal Marketing Practices*, Decision of Comptroller General, Sep 25, 1981, B-198376, B-198377, B-198378-O.M. (unpublished); *Clarification of Provisions of Water Supply Act of 1958 and the Reclamation Act of 1939*, Decision of Comptroller General, Nov 14, 1979, B-157984-O.M.

In my opinion section 6 of the Flood Control Act gives the Secretary of the Army similar authority to market water stored in the Pick-Sloan flood control reservoirs. The Reclamation Projects Act authorizes the Secretary of

Interior to reallocate and market water not needed to fulfill the paramount reclamation purpose of irrigation. Section 6 of the Flood Control Act provides the Secretary of the Army similar authority with regard to water he determines is not needed to fulfill a project purpose in Army reservoirs.

Courts have been deferential to the Secretary of Interior's determinations that the sale of water for municipal water supply does not impair the project's irrigation purpose. *Environmental Defense Fund v. Morton*, 420 F. Supp. at 1045. The legislative history of section 6 of the Flood Control Act implies that the Secretary of the Army's determinations with respect to water stored in Corps reservoirs are to be granted the same deference. In *United States v. 361.91 Acres of Land*, the district court held that:

> The function of carrying out the overall plan for the development of the Missouri River Basin has been delegated by Congress to the Department of [the Army] and Interior, and the Secretaries of those Departments have been vested with a wide discretion in carrying out such plan, and the courts have little or no authority to interfere with the exercise of that discretion.

Environmental Defense Fund v. Morton, 420 F. Supp. at 1043 *quoting United States v. 361.91 Acres of Land*, Civil No. 994 (D. Mont. 1965)

It is my understanding that none of the water stored in Lake Sakakawea is being withdrawn for irrigation purposes. Rather, discharges from Lake Sakakawea flow through the Garrison dam hydro-turbines to produce electricity. In my opinion the Secretary of the Army has the discretion to market water in Lake Sakakawea even if this results in a decrease of the project's actual or potential power production. Section 6 was included in

the Flood Control Act to empower the Secretary of the Army to make reasonable reallocations between the different project purposes.

During congressional debate on Section 6, Congressman Whittington stated:

> It happens in many cases that there is a need, as the War Department has reported to the committee, for water for human consumption because of the drying up of wells. If that need occurs in Ohio, or if that need occurs in Massachusetts, or in any other State, instead of requiring the local people in the first instance where there is inability in many cases to issue bonds and to incur large indebtedness to share in the construction of that reservoir, the purpose of section [6] is to enable the Government, the Secretary of War, and the Chief of Engineers to make a disposition of water there for human consumption or for any proper industrial use . . . . I submit Mr. Chairman, that if it be proper to provide for the storing of waters for reclamation to grow crops in the arid West, with which I am in sympathy, it ought to be all the more in order to provide for the storing of waters for human consumption.

90 Cong. Rec. 4197 (daily ed. May 9, 1944) (statement of Rep. Whittington).

This indicates an intention to put water needs for other human uses on a par with water needs for irrigation. That, in turn, would give the Secretary authority to balance such needs against the need for water for other purposes, such as hydropower, specifically identified in the Pick-Sloan program.

In the case of Lake Sakakawea the argument for making water available for these other human uses is even stronger. It was originally intended that water from the reservoir would be used for irrigation, but none is being

used for that purpose. That "unused" water, at least, surely can be considered surplus water within the meaning of section 6. Thus, section 6 gives the Secretary of the Army discretion to determine whether this water should be used to provide munincipal water supply, at least to the extent that his decision does not unreasonably impair the efficiency of the reservoir's other purposes. Cf. 43 U.S.C. § 485h(c).

Although arguably not required by section 6 of the 1944 Flood Control Act, I suggest that the Department of the Army and the Department of Interior enter into a memorandum of understanding outlining plans for present and future irrigation use of the Lake Sakakawea waters. This would facilitate a determination as to how much surplus water will be available for marketing. Documentation of the availability is desirable both for planning purposes and to ensure that the Army is not exceeding its section 6 authority.

Additionally, I suggest that the contracts be amended to incorporate the comments of Major General Hatch at paragraph 2d of his 16 October 1985 memorandum. Specifically, in order to make the draft contracts consistent with the form contract in ER 1105-2-20 Appendix B, the second WHEREAS clause should be modified to state that the contract is entered into under the authority of the 1944 Flood Control Act. Also, in the interest of minimizing any future disputes, Article 5 should explain the intended compensation formula. Similarly, Article 5 and 6 should explain that the water charge will not change over time except to reflect updated operation, maintenance, and replacement costs.

If we may be of any additional assistance in this matter, please do not hesitate to call.

/s/ Susan J. Crawford
SUSAN J. CRAWFORD
General Counsel

APPENDIX F

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
Washington, D.C. 20310-0103

24 Mar. 1987

MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS

SUBJECT: Sale of Surplus Water

The enclosed Army General Counsel opinions state that the Corps should refrain from using Section 501 of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 9701) to obtain reimbursement for water withdrawals. Army General Counsel also states that Section 6 of the Flood Control Act of 1944 provides sufficient authority and discretion to market water deemed surplus to existing project purposes. That discretion includes water currently being used for authorized purposes and includes any withdrawals for which we would have used 31 U.S.C. 9701 to obtain reimbursement. In view of that opinion, Section 6 of the Flood Control Act of 1944 should be used as the authority for obtaining reimbursement for water withdrawals.

I believe we must assure the states (particularly in the West) that use of Section 6 does not adversely affect the water rights prerogatives of the states. For that reason, it is desirable that we limit the use of this authority to situations that are consistent with these states rights. We should rely primarily on the authority of the Water Supply Act of 1958 to reallocate and sell storage in accordance with existing policies. Use of the Section 6 authority should be encouraged only where non-Federal interests do not want to buy storage because: (1) the use for the water is a short term one; or (2) the use is

temporary pending the development of the authorized use of the water and reallocation of storage is not appropriate. The views of the affected state(s) will be obtained, as appropriate, prior to consummating any sale using Section 6.

In accordance with Section 6, contracts for the use of surplus water will be at a reasonable price. A reasonable price is the market value. That annual value should be determined by the same procedure used to determine the annual payment for reallocated storage. However, the price should be limited to the annual cost of the least cost alternative but never less than the benefits foregone or, in the case of hydropower, revenues foregone.

For certain small withdrawals, using Section 6 authority, you may wish to establish a standard minimum charge or a standard unit charge which would be applied to a number of withdrawals from a project. Where such standard charges are proposed, they should be submitted to this office for approval. Section 6 contracts based on less than 50 acre-feet of storage need not be submitted to this office for approval.

The Counsel opinions also may provide increased flexibility for making water available for temporary use for municipal and industrial (M&I) purposes during periods of drought. It would be desirable to modify drought management plans to identify that flexibility and establish that the above procedure will be used to determine the price which we will charge for the use of water in our reservoirs during drought. In many instances, our projects provide an inexpensive insurance policy which allows local interests to defer construction of new water sources knowing that we will modify our project operations to the maximum amount possible to insure that M&I requirements are met. Often the operational changes cost the Government money. Our recent experience in the Southeast is a good example. There we reduced power output at Lake Lanier to meet Atlanta's requirements.

As a result, the Southeast Power Administration was required to spend additional funds to purchase power to meet contractual agreements. This in no way reflects negatively on the handling of the drought emergency in the Southeast. I believe it was well handled. I use it only as an example of the service which our projects provide for which the Federal Government should be reimbursed. Since it is extremely difficult to negotiate a price during a drought situation, the procedure/formula should be established beforehand. I would appreciate your views in this area.

/s/ Bob K. Dawson
ROBERT K. DAWSON
Assistant Secretary of the Army
(Civil Works)

Enclosures

APPENDIX G

ENVIRONMENTAL ASSESSMENT

for the

WATER INTAKE PERMITS, EASEMENTS,
AND MUNICIPAL WATER SERVICE CONTRACT

related to the

ENERGY TRANSPORTATION SYSTEMS, INC.
(ETSI) PIPELINE

and

SOUTH DAKOTA MUNICIPAL WATER SUPPLY

JUNE 1982

OMAHA DISTRICT

U.S. ARMY CORPS OF ENGINEERS

* * * *

NEED FOR AND OBJECTIVE OF ACTION

AUTHORITIES

The currently proposed Oahe water intake system falls under the requirements of Section 404 of the Clean Water Act and Section 10 of the River and Harbor Act of 1899. The Corps of Engineers has permitting authority under these laws.

Another potential Corps action to be covered by this assessment are easements or similar instruments for the water pipeline and related structures on Corps Land adjacent to Lake Oahe. The Corps would determine and

charge an appraised value for the land to be used and would provide a conditioned easement of a certain term.

Additionally, the Corps has responsibility, by virtue of the Independent Office Appropriation Act of 1952, to make a contract and levy a service charge for water made available to municipal users. Any water service contract would likely be negotiated with the State of South Dakota or with the communities and Rural Water Systems which would use the water.

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APPENDIX H

Reclamation Reform Act of 1982

Report of the Senate Committee on
Energy and Natural Resources

No. 97-373 April 29, 1982

[to accompany S.1867]

* * * *

[page 6]

PURPOSE

As reported, S. 1867 is the culmination of extensive effort on the part of both Houses of Congress and reflects previous Committee as well as floor activities seeking to reconcile 80 years of history and law to the current con-

[page 7]

siderations of farm practices and economics. As amended, S. 1867 provides a modern statement of Congressional policy on the program and related administrative efforts carried out pursuant to the Federal reclamation law.

[page 11]

A major purpose of S. 1867 is to provide a modern policy expression regarding Federal reclamation law in order to resolve the many controversies which would otherwise result from the implementation of regulations based upon current law.

[page 13]

Section 2(d).—The term "irrigation water" means water only made available for agricultural purposes from the operation of reclamation project facilities pursuant to a contract with the Secretary.

[pages 15-16]

Section 8(a).—This section clarifies the Congressional intent that the acreage limitation of reclamation law does not apply to projects constructed by the U.S. Army Corps of Engineers unless: (1) by explicit statutory language the Congress has designated the project as a reclamation project or has integrated it with or made it a part of a reclamation project; or (2) in addition to the project works constructed by the Corps, the Secretary of the Interior pursuant to the Federal reclamation law has also provided project works for control or conveyance of an agricultural water supply to the lands in question.

Section 8 of the Flood Control Act of 1944 provided that dams constructed by the Corps of Engineers thereafter "may be utilized for irrigation purposes", and the Act authorized the Secretary of the Interior to become involved in such projects "under the provisions of the Federal reclamation laws". The wording of the section is ambiguous and has given rise to sweeping controversies concerning the application of the reclamation law to agricultural lands which are benefited by dams constructed by the Corps. Subsequent court decisions and sporadic efforts on the part of successive Secretaries of the Interior to consummate contracts with various beneficiaries of Corps projects have served to create a shadow extending over all agricultural lands involved with Corps projects.

The Committee intends to make clear that section 8 of the Flood Control Act of 1944 did not, in and of itself, make the reclamation law applicable to any specific project. The specific legislation dealing with the project in question must be consulted to determine the applicability of the reclamation law.

It is the intention of the Committee that the Corps exemption does and shall apply to the projects on the Kings, Kern, Kaweah and Tule Rivers in California authorized by the Flood Control Act of 1944 (58 Stat. 887). It is also the intention of the Committee that this exemption does and shall apply to all Corps projects outside the 17 reclamation States. It is the general intent of this section to eliminate the shadow of applicability of the reclamation law to Corps of Engineers projects in any case in which the intent of Congress concerning such applicability is not clearly and explicitly set forth in statutory language.

Section 8(b).—The provision has been included in the bill to insure that the Secretary's authority to contract with water user entities for the irrigation water deliveries from Corps of Engineers projects, and to collect appropriate charges for those deliveries, continues in effect.